

Tune Talk Sdn Bhd v Padda Gurtaj Singh

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
NO W-02(IM)(NCC)-1712–10 OF 2014
ALIZATUL KHAIR, ABANG ISKANDAR AND NALLINI
PATHMANATHAN JJCA
18 JANUARY 2019

Arbitration — Award — Enforcement — Whether applicant for recognition and enforcement of arbitral award under s 38 of the Arbitration Act 2005 ('the AA') had to comply with terms of O 69 r 8(2)(b) of the Rules of Court 2012 ('the ROC') as a substantive requirement — Whether it was sufficient if applicant only complied with requirements of s 38 — Whether if requirements of s 38 were met High Court had no discretion but to grant recognition and enforcement of award if no grounds under s 39 of the AA were proven for application to be refused — Whether O 69 r 8(2)(b) was merely procedural and non-compliance with it did not render order for recognition/enforcement invalid or liable to be set aside — Whether in view of ss 38 and 39 of the AA common law principles could not be invoked in an application for recognition/enforcement of an arbitral award — Whether applicant did not have to show as pre-requisite that award contained a positive order that had not been complied with — Whether recognition/enforcement could not be refused simply because award was merely declaratory or was a refusal of declarations that were sought by claimant in the arbitration

The instant appeal raised the question of whether a party applying for recognition and enforcement of an arbitral award under s 38 of the Arbitration Act 2005 ('the AA') was required to comply with O 69 r 8(2)(b) of the Rules of Court 2012 ('the ROC') as a pre-requisite substantive requirement. That rule of court required the applicant to state 'either that the award has not been complied with or the extent to which it has not been complied with at the date of the application'. In contrast, ss 38(1) and (2) of the AA provided that the High Court 'shall' recognise an arbitral award as binding and enforce it by entry as a judgment provided the applicant had produced before the court the duly authenticated original award (or a duly certified copy thereof) and the original arbitration agreement (or a duly certified copy thereof). Recognition and enforcement would be refused if the party against whom it was invoked was able to prove any of the nine grounds stipulated in s 39 of the AA. In the instant case, the appellant ('TTSB') filed arbitration proceedings against the respondent ('PGS') seeking several declarations to the effect that PGS could no longer remain as a director of TTSB. The arbitrator dismissed all of TTSB's claims with costs. Therefore, apart from the order to pay costs (which was not

- A in issue), the award did not require TTSB to comply with any positive obligation. When PGS applied for and obtained an ex parte order from the High Court under s 38 of the AA for recognition and enforcement of the award, TTSB applied (vide encl 6) to set the order aside on the ground the court should have refused to grant the order on the basis that: (a) there was no
- B positive order under the award that required recognition/enforcement; (b) an award which was merely declaratory (or negatively declaratory in the instant case) was incapable of enforcement; (c) the s 38 application was a pointless exercise as PGS did not secure any material benefit or utility from obtaining the order for recognition/enforcement. The main thrust of TTSB's arguments was
- C that PGS had failed to comply with O 69 r 8(2)(b) as a substantive requirement in that he had not made full and frank disclosure, inter alia, of the fact that there was nothing under the award that TTSB had failed to comply with. TTSB argued that O 69 r 8(2)(b) was not just a procedural provision but, read together with s 38 of the AA, comprised the jurisdictional basis on which the
- D court could hear an application for recognition and enforcement. It argued that it was only after the applicant had complied with that rule of court and produced the documents required under s 38 of the AA that the court was required to consider whether any of the grounds under s 39 of the AA had been proven to deny the application. PGS, however, countered that O 69 r 8(2)(b)
- E was merely a procedural provision, non-compliance with which did not render an order made for recognition/enforcement invalid or liable to be set aside. PGS asserted that the said rule of court, being subsidiary legislation, could not override the mandatory provisions of s 38 and that whatever substantive requirements an applicant had to comply with was contained within s 38 itself;
- F accordingly, apart from ss 38 and 39 of the AA, the court could not rely upon any other extraneous ground to refuse an application for recognition/enforcement. The High Court dismissed encl 6 holding, inter alia, that: (i) there was no pre-condition that an arbitral award had to contain a positive order in order for the award to be granted recognition/enforcement;
- G (ii) a declaratory order was just as capable of being recognised/enforced; (iii) recognition/enforcement of an award could only be refused if any of the grounds under s 39 of the AA had been proven; and (iv) O 69 r 8(2)(b) of the ROC was merely a procedural requirement, non-compliance with which was not fatal; it was sufficient if PGS had complied with the terms of s 38 of the AA.
- H TTSB appealed against the decision.

Held, by majority, dismissing the appeal:

- I (1) (**per Alizatul Khair JCA, majority**) The High Court did not err in dismissing encl 6 as PGS had fully complied with the requirements under ss 38–39 of the AA as well as O 69 r 8(2) of the ROC. TTSB did not challenge the arbitral award on any of the grounds listed under s 39 of the AA nor did it apply to set aside the award (see para 149).
- (2) (**per Alizatul Khair JCA, majority**) Sections 38–39 of the AA were

- meant to be exhaustive and contained all the substantive requirements that had to be fulfilled in respect of an application for recognition and enforcement of an award under the AA. There was no room for any other substantive requirements to be satisfied (see para 150). A
- (3) (**per Alizatul Khair JCA, majority**) Order 69 r 8(2)(b) of the ROC was merely a procedural, and not a substantive, requirement and non-compliance with it was not fatal to an application for recognition and enforcement. If Parliament had intended that rule of court to be a condition precedent for the recognition and enforcement of arbitral awards, it would have been included in the AA but it was not. If O 69 r 8(2)(b) was construed as a substantive requirement it would be inconsistent with the AA and limit the rights to recognition and enforcement of awards. O 69 r 8(2)(b) was clearly subordinate to s 38 of the AA. Hence, any non-compliance could be remedied or rectified vide O 2 r 2 of the ROC in the interests of justice (see paras 95, 100, 106 & 151). B C D
- (4) (**per Alizatul Khair JCA, majority**) There was no room for the application of common law principles in an application for recognition and enforcement of an award under the AA, ie, it was not the case that only an award that contained a positive order could be recognised and enforced and not one which was negatively declaratory and did not confer any material benefit or utility on the applicant. Such conditions were not contemplated by the AA. Leave to enforce arbitral awards which were declaratory in nature had been granted by courts in England and Australia (see paras 152 & 154). E F
- (5) (**per Alizatul Khair JCA, majority**) Unlike other jurisdictions which conferred discretion on the courts in the enforcement of arbitral awards, s 38 of the AA was mandatory in nature and conferred no such discretion. So long as the substantive requirements stated in s 38 were fulfilled and no grounds under s 39 had been proven, recognition and enforcement had to be granted (see paras 77 & 150). G
- (6) (**per Alizatul Khair JCA, majority**) Although O 69 r 8(2)(b) of the ROC used the word 'permission', it did not mean discretion was conferred on the court in the same manner as discretion was conferred on the courts in the UK, Singapore and to a certain extent, Australia. The discretion conferred on the courts in those jurisdictions was provided for by the statute itself and not in subsidiary legislation (as the rule of court in the present case was). To construe O 69 r 8(2)(b) as conferring discretion as aforesaid was inconsistent and in conflict with the clear words of s 38 of the AA. The word 'permission' in that rule of court was, in the context of the AA, merely formalistic (see paras 153–155). H I
- (7) (**per Nallini Pathmanathan JCA, dissenting**) Order 69 r 8(2)(b) of the

- A ROC was not merely adjectival in nature but served a useful purpose in an application for registration and enforcement of an arbitral award. When O 69 r 8(2)(b) was read harmoniously with s 38 of the AA, the court was in a position to promote the purpose of the AA by, first,
- B ascertaining if the award contained some positive act or thing which had to be performed but which had not been performed; secondly, proceed to register and enforce that positive act or thing that required enforcement; thirdly, exercise its discretion to refuse registration/enforcement if there was nothing in the award that required compliance, such as a negative declaration as in the instant case or a failure to grant the claimant the relief that was sought. In concluding that summary enforcement was unwarranted, as there was nothing to enforce, the court could consider whether there was any utility or benefit in making the order of recognition and enforcement. The court was not bound to mandatorily recognise/enforce an award just because s 38 of the AA had been fulfilled (see paras 213, 215 & 219).
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- E (8) (**per Nallini Pathmanathan JCA, dissenting**) Notwithstanding the seemingly mandatory tenor of s 38 of the AA, a harmonious reading of O 69 r 8(2)(b) with s 38 suggested that the court was entitled to: (a) peruse and consider the application to ascertain if there was non-compliance with the substance of the award; and (b) exercise its discretion to refuse to register the award if there was no material benefit to be gleaned from such registration per se. The court could determine whether it was appropriate to register a judgment in terms of the award. If there was nothing to be enforced, or capable of enforcement, the court was not precluded from determining the validity or requirement for registration. The registration of an award which could not be enforced and where there had been no non-compliance served no purpose (see paras 220–221 & 226).
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- G (9) (**per Nallini Pathmanathan JCA, dissenting**) PGS' argument that the steps taken by TTTSB to remove him from its board of directors subsequent to the handing down of the final arbitral award amounted to non-compliance with the substance of the award had no merit. TTTSB's shareholders were exercising their rights available to them as a consequence of the findings made in the arbitral award. TTTSB did not go against the terms of the award nor fail to comply with it (see paras 228–229).
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- I (10) (**per Nallini Pathmanathan JCA, dissenting**) The High Court failed to appreciate that a positive order was a prerequisite for the purposes of recognition and enforcement. It was not sufficient if there was only compliance with s 38 of the AA. The court also had to consider, pursuant to O 69 r 8(2)(b) of the ROC, whether there had been non-compliance, which, in the instant case, there never was. The High Court erroneously

went on to consider whether any of the grounds in s 39 came into play without ascertaining whether the first stage of compliance under s 38 of the AA read together with O 69 r 8(2)(b) of the ROC had been satisfied (see para 230).

[Bahasa Malaysia summary]

Rayuan ini menimbulkan persoalan sama ada pihak yang memohon pengiktirafan dan penguatkuasaan award timbang tara di bawah s 38 Akta Timbang Tara 2005 ('ATT') dikehendaki mematuhi A 69 k 8(2)(b) Kaedah-Kaedah Mahkamah 2012 ('KKM') sebagai keperluan penting pra-syarat. Kaedah mahkamah yang menghendaki pemohon menyatakan 'either that the award has not been complied with or the extent to which it has not been complied with at the date of the application'. Berbeza daripada ss 38(1) dan (2) ATT dengan syarat bahawa Mahkamah Tinggi mengiktiraf award timbang tara sebagai mengikat dan menguatkuasakannya dengan kemasukan sebagai penghakiman dengan syarat pemohon telah mengemukakan di hadapan mahkamah award asal yang telah disahkan sewajarnya (atau salinan yang telah disahkan) dan perjanjian timbang tara asal (atau salinan yang telah disahkan). Pengiktirafan dan penguatkuasaan akan ditolak jika pihak yang terhadapnya ia telah digunakan dapat membuktikan mana-mana sembilan alasan yang ditetapkan dalam s 39 ATT tersebut. Dalam kes ini, perayu ('TTSB') telah memfailkan prosiding timbang tara terhadap responden ('PGS') memohon beberapa deklarasi sehingga kesannya agar PGS tidak lagi kekal sebagai pengarah TTSB. Penimbang tara telah menolak kesemua tuntutan TTSB dengan kos. Oleh demikian, selain daripada perintah untuk membayar kos (yang bukan merupakan isu), award tersebut tidak menghendaki TTSB mematuhi apa-apa obligasi positif. Apabila PGS gagal memohon untuk dan memperoleh perintah ex parte dari Mahkamah Tinggi di bawah s 38 ATT tersebut untuk pengiktirafan dan penguatkuasaan award tersebut, TTSB telah memohon (melalui lampiran 6) untuk mengetepikan perintah tersebut atas alasan mahkamah patut menolak untuk memberikan perintah atas asas bahawa: (a) tiada perintah positif di bawah award tersebut yang menghendaki pengiktirafan dan penguatkuasaan; (b) award yang semata-mata bersifat deklarasi (atau tidak bersifat deklarasi dalam kes ini) tidak mampu dikuatkuasakan; (c) permohonan s 38 adalah tindakan sia-sia kerana PGS tidak memperoleh sebarang faedah atau manfaat material daripada mendapatkan perintah pengiktirafan/penguatkuasaan. Inti utama hujah TTSB adalah bahawa PGS gagal mematuhi A 69 k 8(2)(b) sebagai syarat penting kerana dia tidak membuat pendedahan penuh dan terus terang, antara lain, tentang fakta bahawa tiada apa-apa di bawah award itu yang gagal dipatuhi oleh TTSB. TTSB berhujah bahawa A 69 k 8(2)(b) bukan hanya peruntukan prosedur tetapi, dibaca bersama s 38 ATT, terdiri daripada asas bidang kuasa di mana mahkamah dapat mendengar permohonan pengiktirafan dan penguatkuasaan. Ia berhujah bahawa hanya setelah pemohon mematuhi kaedah mahkamah itu dan mengemukakan

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- A dokumen-dokumen yang diperlukan di bawah s 38 ATT maka mahkamah dikehendaki untuk mempertimbangkan sama ada salah satu alasan di bawah s 39 ATT telah dibuktikan untuk menafikan permohonan tersebut. PGS, bagaimanapun, membantah bahawa A 69 k 8(2)(b) hanyalah peruntukan prosedur, ketidakpatuhan yang tidak menjadikan perintah yang dibuat untuk
- B pengiktirafan/penguatkuasaan tidak sah atau boleh diketepikan. PGS menegaskan bahawa kaedah mahkamah tersebut, sebagai perundangan subsidiari, tidak boleh mengatasi peruntukan mandatori s 38 dan bahawa apa pun keperluan penting yang perlu dipatuhi oleh pemohon terkandung dalam s 38 itu sendiri; oleh itu, selain daripada ss 38 dan 39 ATT, mahkamah tidak
- C dapat bergantung kepada mana-mana alasan luar biasa yang lain untuk menolak suatu permohonan pengiktirafan/penguatkuasaan. Mahkamah Tinggi menolak lampiran 6 dengan memutuskan, antara lain, bahawa: (i) tiada prasyarat bahawa award timbang tara perlu mengandungi perintah positif agar award itu diberikan pengiktirafan/penguatkuasaan: (ii) perintah deklarasi adalah sama mampu untuk diiktiraf/dikuatkuasakan; (iii) pengiktirafan/penguatkuasaan award hanya boleh ditolak sekiranya ada alasan di bawah s 39 ATT telah dibuktikan; dan (iv) A 69 k 8(2)(b) KKM hanyalah keperluan prosedur, ketidakpatuhan yang tidak memudaratkan; ia adalah mencukupi sekiranya PGS telah mematuhi terma-terma s 38 ATT. TTSB mengemukakan rayuan terhadap keputusan tersebut.
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Diputuskan, dengan majority, menolak rayuan:

- F (1) **(oleh Alizatul Khair HMR, majoriti)** Mahkamah Tinggi tidak terkhilaf kerana menolak lampiran 6 kerana PGS telah mematuhi keperluan di bawah ss 38–39 ATT dan juga A 69 k 8(2) KKM. TTSB tidak mencabar award timbang tara atas apa-apa alasan yang disenaraikan di bawah s 39 ATT mahu pun ia memohon untuk mengetepikan award tersebut (lihat perenggan 149).
- G (2) **(oleh Alizatul Khair HMR, majoriti)** Seksyen-seksyen 38 dan 39 ATT bertujuan untuk menjadi menyeluruh dan mengandungi semua keperluan substantif yang perlu dipenuhi berkaitan permohonan untuk pengiktirafan dan penguatkuasaan suatu award di bawah AT. Tiada ruang untuk keperluan substantif lain untuk dipenuhi (lihat perenggan 150).
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- I (3) **(oleh Alizatul Khair HMR, majoriti)** Aturan 69 k 8(2)(b) KKM hanya keperluan prosedur dan bukan substantif dan ketidakpatuhannya tidak memusaratkan kepada suatu permohonan untuk pengiktirafan dan penguatkuasaan. Jika Parlimen berhasrat agar kaedah mahkamah itu sebagai prasyarat untuk pengiktirafan dan penguatkuasaan award timbang tara, ia tentu dimasukkan dalam ATT tersebut tetapi tidak begitu. Jika A 69 k 8(2)(b) ditafsirkan sebagai keperluan substantif maka ia tidak konsisten dengan ATT dan mengehadkan hak kepada award

- pengiktirafan dan penguatkuasaan. A 69 k 8(2)(b) jelas tidak mengatasi s 38 ATT. Justeru, apa-apa ketidakpatuhan boleh diremedikan atau diperbetulkan melalui A 2 k 2 KKM demi kepentingan keadilan (lihat perenggan 95, 100, 105 & 151). A
- (4) **(oleh Alizatul Khair HMR, majoriti)** Tiada ruang untuk pemakaian prinsip undang-undang am dalam suatu permohonan untuk pengiktirafan dan penguatkuasaan award di bawah ATT, iaitu ia bukan hanya kerana award yang mengandungi perintah positif boleh diiktiraf dan dikuatkuasakan dan bukan suatu yang tidak bersifat deklarasi dan tidak memberikan apa-apa faedah atau kegunaan material kepada pemohon. Syarat-syarat sedemikian tidak dijangkakan oleh ATT. Kebenaran untuk menguatkuasakan award timbang tara yang bersifat deklarasi telahpun diberikan oleh mahkamah di England dan Australia (lihat perenggan 152 & 154). B C
- (5) **(oleh Alizatul Khair HMR, majoriti)** Tidak seperti bidang kuasa lain yang memberikan budi bicara kepada mahkamah dalam penguatkuasaan award timbang tara, s 38 ATT adalah bersifat mandatori dan tidak memberikan budi bicara seperti itu. Selagi keperluan substantif yang dinyatakan dalam s 38 dipenuhi dan tidak ada alasan di bawah s 39 telah dibuktikan, pengiktirafan dan penguatkuasaan patut diberikan (lihat perenggan 77 & 150). D E
- (6) **(oleh Alizatul Khair HMR, majoriti)** Walaupun A 69 k 8(2)(b) KKM menggunakan perkataan 'permission', itu tidak bermaksud budi bicara diberikan kepada mahkamah dengan cara yang sama seperti budi bicara yang diberikan pada mahkamah di UK, Singapura dan pada tahap tertentu, Australia. Budi bicara yang diberikan kepada mahkamah dalam bidang kuasa tersebut diperuntukkan oleh undang-undang itu sendiri dan bukan dalam perundangan subsidiari (sebagaimana kaedah mahkamah dalam hal ini). Untuk menafsirkan A 69 k 8(2)(b) sebagai memberikan budi bicara seperti yang disebutkan di atas tidak konsisten dan bertentangan dengan kata-kata jelas s 38 dari ATT. Perkataan 'permission' dalam kaedah mahkamah tersebut, dalam konteks ATT, hanyalah formalistik (lihat perenggan 153–155). F G
- (7) **(oleh Nallini Pathmanathan HMR, menentang)** Aturan 69 k 8(2)(b) KKM bukan hanya bersifat adjektif tetapi memenuhi tujuan berguna dalam permohonan pendaftaran dan penguatkuasaan award timbang tara. Apabila A 69 k 8(2)(b) dibaca secara harmoni dengan s 38 ATT, mahkamah dapat mempromosikan tujuan ATT dengan, pertama, memastikan jika award itu mengandungi beberapa tindakan atau perkara positif yang perlu dilaksanakan tetapi yang belum dilaksanakan; kedua, meneruskan untuk mendaftar dan menguatkuasakan tindakan atau perkara positif yang memerlukan penguatkuasaan; ketiga, menggunakan budi bicaranya untuk menolak pendaftaran/penguatkuasaan jika tidak H I

- A ada apa-apa dalam award yang memerlukan pematuhan, seperti deklarasi negatif seperti dalam kes ini atau kegagalan untuk memberikan penuntut relief yang dipohon. Dengan membuat kesimpulan bahawa penguatkuasaan terus adalah tidak wajar, kerana tiada yang perlu dikuatkuasakan, mahkamah dapat mempertimbangkan sama ada terdapat manfaat atau kegunaan dalam membuat perintah pengiktirafan dan penguatkuasaan. Mahkamah tidak terikat untuk mengiktiraf/menguatkuasakan award secara mandatori hanya kerana s 38 ATT telah dipenuhi (lihat perenggan 213, 215 & 219).
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- C (8) **(oleh Nallini Pathmanathan HMR, menentang)** Walau pun s 38 ATT dilihat sebagai mandatori, pembacaan secara harfiah A 69 k 8(2)(b) dengan s 38 mencadangkan bahawa mahkamah berhak untuk:
- D (a) meneliti dan mempertimbangkan pemakaian tersebut untuk menentukan jika terdapat ketidakpatuhan dengan kandungan award;
- E (b) penggunaan budi bicaranya untuk enggan mendaftar award jika tiada faedah material yang diperoleh daripada pendaftaran tersebut. Mahkamah boleh menentukan sama ada ia sesuai untuk mendaftar penghakiman mengikut terma award. Jika tiada untuk dikuatkuasakan, atau mampu dikuatkuasakan, mahkamah tidak dihalang daripada menentukan kesahan atau keperluan pendaftaran. Pendaftaran suatu award yang tidak boleh dikuatkuasakan dan di mana tiada ketidakpatuhan tidak mempunyai tujuan (lihat perenggan 220–221 & 226).
- F (9) **(oleh Nallini Pathmanathan HMR, menentang)** Hujah PGS bahawa langkah-langkah yang diambil oleh TTSB untuk mengusirnya dari lembaga pengarahnya berikutan penyampaian award timbang tara yang muktamad tidak merupakan ketidakpatuhan dengan kandungan award tidak mempunyai merit. Pemegang-pemegang saham TTSB menggunakan hak mereka akibat dapatan yang dibuat dalam award timbang tara itu. TTSB tidak menentang terma-terma award itu atau gagal mematuhi (lihat perenggan 228–229).
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- H (10) **(oleh Nallini Pathmanathan HMR, menentang)** Mahkamah Tinggi telah gagal memahami bahawa perintah positif adalah prasyarat untuk tujuan pengiktirafan dan penguatkuasaan. Ia tidak mencukupi jika hanya terdapat pematuhan s 38 ATT. Mahkamah juga perlu mempertimbangkan, menurut A 69 k 8(2)(b) KKM, sama ada terdapat ketidakpatuhan, yang mana, dalam kes ini, tiada. Mahkamah Tinggi terkhilaf dalam mempertimbangkan sama ada apa-apa alasan dalam s 39 tanpa menentukan sama ada peringkat pertama pematuhan di bawah s 38 ATT dibaca bersama A 69 k 8(2)(b) KKM telah dipenuhi (lihat perenggan 230).]
- I

Cases referred to

- AED Oil Ltd v Puffin FPSO Ltd* [2010] VSCA 37, SC (refd) **A**
- Agrovenus LLP v Pacific Inter-Link Sdn Bhd and another appeal* [2014] 3 MLJ 648, CA (refd)
- Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] 3 SLR 174, HC (refd) **B**
- Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041; [2003] UKPC 11, PC (refd)
- Bauer (M) Sdn Bhd v Embassy Court Sdn Bhd* [2010] MLJU 1323; [2010] 1 LNS 1260, HC (refd) **C**
- Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345, FC (refd)
- Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbertriebe Registrierte Genossenschaft Mit Beschränkter Haftung* [1953] 2 All ER 1039, QBD (refd)
- Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2010] 3 SLR 661 (refd) **D**
- Deo Narain Singh and Ors v Siabar Singh* AIR 1952 Pat 461, HC (refd)
- Dominic Chin Joon Siong v PP* [2008] 3 MLJ 24, CA (refd)
- Hari Bhadur Ghale v PP* [2012] 6 MLJ 597, FC (refd)
- IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 282 ALR 717, SC (refd) **E**
- Kelana Erat Sdn Bhd v Niche Properties Sdn Bhd and another application* [2012] 5 MLJ 809, HC (refd)
- Lee Teng Siong v Lee Kheng Lian & Ors* [2006] 5 MLJ 609; [2006] 4 CLJ 443, CA (refd) **F**
- Leftenan Kolonel Abdul Aziz bin Buyong & Anor v Raja Petra bin Raja Kamarudin* [2012] MLJU 1347, HC (refd)
- London Steam Ship Owners Mutual Insurance Association Ltd v Kingdom of Spain and another* [2013] All ER (D) 299 (Oct); [2013] EWHC 3188 (Comm), QBD (refd) **G**
- Low Cheng Soon v TA Securities Sdn Bhd* [2003] 1 MLJ 389, CA (refd)
- Magudar bin Ambit v Rambilin bt Ambit & Ors* [2014] 5 MLJ 873, CA (refd)
- Maharashtra SBOS & HS Education v Paritosh Bhupesh Kumar Sheth* 1984 AIR 1543, SC (refd)
- Ngo Chew Hong Oils & Fats (M) Sdn Bhd v Karya Rumpun Sdn Bhd* [2009] MLJU 1335; [2009] 1 LNS 1321, HC (refd) **H**
- Open Type Joint Stock Co Efirnoye ('EFKO') v Alfa Trading Ltd* [2012] 1 MLJ 685, HC (refd)
- Potti Venkata Kasi Viswanadham v Vallabha Vyas* AIR 1983 AP 64, HC (distd)
- Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97, FC (refd) **I**
- R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, FC (refd)
- R v O'Brien and another* [1985] 1 All ER 971, QBD (refd)

- A** *Raymond v Honey* [1983] 1 AC 1, HL (refd)
Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim [2008] 3 MLJ 753, FC (refd)
Sisma Enterprise Sdn Bhd v Solstad Offshore Asia Pacific Ltd [2013] MLJU 1625; [2013] 1 LNS 335, HC (refd)
- B** *Soorajmull Nagarmal v Golden Fibre and Products* AIR 1969 Cal 381, HC (refd)
Sundaram Brake Linings Ltd v Kotak Mahindra Bank Ltd A No 8078 of 2007, HC (refd)
- C** *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 3)* [2010] 2 MLJ 141, FC (refd)
Tridon Australia Pty Ltd v ACD Tridon Inc (Inc in Ontario) [2004] NSWCA 146, SC (refd)
West Tankers Inc v Allianz Spa, The Front Comor [2012] 2 All ER (Comm) 113; [2012] EWCA Civ 27, CA (distd)
- D** *Yap Teck Ngian v Yap Hong Lang @ Yap Fong Mei & Ors* [2006] 6 MLJ 607, CA (refd)

Legislation referred to

- Arbitration Act 1952 (repealed by Arbitration Act 2005)
- E** Arbitration Act 2005 ss 2, 8, 35, 38, 38(1), (2), 39, 39(1), (1)(a)(i), (1)(a)(ii), (1)(a)(iii), (1)(a)(iv), (1)(a)(v), (1)(a)(vi), (1)(a)(vii), (1)(b)
 Arbitration Act [SG]
 Commercial Arbitration Act 1984 [AUS] s 33
 Commercial Arbitration Act 2010 [AUS] s 35(1)
- F** Companies Act 1965 s 181
 Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (repealed by Arbitration Act 2005)
 Courts of Judicature Act 1964 ss 16(a), 17(1)
 Arbitration Act 1996 [UK] s 66, 66(1)
- G** Arbitration Ordinance 2013 [HK] s 84
 Arbitration and Conciliation Act 1996 [IND] s 36
 International Arbitration Act [SG] s 31(2), (2)(b)
 Interpretation Acts 1948 and 1967 s 17A
- H** Rules of Court 2012 O 2 rr 1(1), 1(2), 2, O 14, O 69 r 8, 8(2), (2)(b), (3), O 81
 Rules of the Federal Court 1995 r 137

Appeal from: Originating Summons No 24NCC(ARB)-6-02 of 2014 (High Court, Kuala Lumpur)

- I** *Logan Sabapathy (Carmelia Cheong with him) (Logan Sabapathy & Co) for the appellant.*
Shamala Balasundram (Tan Hui Xian and Mohd Aerie Rahman with her) (Chooi & Co) for the respondent.

Alizatul Khair JCA (delivering majority judgment of the court):

A

INTRODUCTION

[1] This appeal arose out of the decision of the learned High Court judge who, on 3 September 2014 dismissed the appellant's application ('encl 6') to set aside the ex parte order dated 4 March 2014 ('the said ex parte order') for the recognition and enforcement of a final award made in favour of the respondent in arbitration proceedings. The order for recognition and enforcement was made in accordance with s 38 of the Arbitration Act 2005 ('the AA') and under O 69 r 8(2)(b) of the Rules of Court 2012 ('the ROC').

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[2] We had, after hearing submissions by counsel for both the appellant and the respondent, by a majority (Justice Nallini Pathmanathan dissenting) dismissed the appellant's appeal. Our reasons appear below.

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[3] The appellant and respondent will be referred to as they were referred to in the High Court.

[4] This appeal involves essentially a question of law, viz:

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(a) s 38 of the AA;

(b) s 39 of the AA; and

(c) O 69 r 8(2) of the Rules of Court 2012 ('the ROC').

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To fully appreciate the issue at hand, it is perhaps necessary to set out a brief background of the facts leading to the present appeal. For this purpose we adopt with some modification the brief background facts as set out by the learned judge in her judgment.

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BRIEF BACKGROUND FACTS

[5] On 23 December 2008 a shareholders' agreement ('SA') was entered into between the plaintiff and the defendant together with several other parties. The SA contained an arbitration clause ('cl 16.1').

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[6] A dispute arose between the parties and pursuant to cl 16.1 the dispute was referred to arbitration. The said arbitration clause, the scope of which is not disputed, is reproduced below for completeness:

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If any controversy, claim or dispute arises out of or in relation to this Agreement (including any question regarding its existence, validity or termination) or with respect to any breach thereof, the Parties shall seek to resolve the matter amicably through discussions between the Parties or by way of mediation. Only if the Parties

- A fail to or compromise within sixty (60) days from the date of written notice of the dispute, the aggrieved Party shall seek arbitration as set forth in this Clause 16.

- B [7] The arbitration proceedings commenced before a single arbitrator, Mr Samuel Wong Chat Chor. After a full hearing the learned arbitrator issued the final award in favour of the plaintiff in the following terms:

- C (1) *The Claimant's claim for a declaration that the Respondent is not entitled to remain on the Board of the Claimant is dismissed;*
- C (2) *The Respondent was/is not in 'Material Breach' of any term of the Shareholders' Agreement; and*
- C (3) *The relief of 'Compulsory Transfer Notice' under Clause 10 of the Shareholders' Agreement is denied.*
- D (4) *As to costs, the usual order of costs to follow the event is adopted and the Claimant shall bear the Respondent's costs of this arbitration and costs of the award, to be taxed if not agreed. And I reserve taxation to myself if that becomes necessary. (Emphasis added.)*

- E [8] As we shall see later in the judgment, it was the aforesaid terms of the final award (above) that forms the basis of the defendant's application to set aside the said ex parte order adverted to earlier. Following the issuance of the final award the plaintiff applied by way of originating summons for the said award to be recognised as binding and be enforced by entry as a judgment in accordance with s 38(2) of the AA.

- F [9] As stated earlier, the learned judge on 4 March 2014 granted the said ex parte order.

- G [10] On 7 April 2014, the defendant applied to set aside the said ex parte order vide encl 6. The learned judge dismissed encl 6 on 3 September 2014 thus giving rise to the present appeal.

THE DEFENDANT'S GROUNDS OF APPEAL

- H [11] Inter alia, the defendant's grounds of appeal as set out in the memorandum of appeal were as follows:

- I (1) The learned High Court Judge erred in failing to order that the Respondent did not meet the mandatory requirements of Order 69 rule 8(2)(b) of the Rules of Court 2012 in obtaining the Ex-Parte Registration Order, rendering it liable to be set aside;
- I (2) The learned High Court Judge failed to give sufficient or any consideration to the Respondent's breach, in obtaining the Ex-Parte Registration Order, in failing to give full and frank disclosure;

- (3) The learned High Court Judge erred in failing to appreciate, sufficiently or at all, that there is or would be no material benefit or utility to be obtained by the registration and enforcement of an arbitral award which did not have any positive obligations or outstanding positive obligations or was otherwise only declaratory; A
- (4) The learned High Court Judge erred in failing to appreciate, sufficiently or at all, that at the first ex-parte stage an applicant must comply with all requirements justifying registration of an award failing which such ex-parte registration is capable of challenge and ought to be set aside; and B
- (5) The learned High Court Judge erred in directly applying the second stage test under section 39 of the Arbitration Act 2005 to the case at hand. C

DISCUSSION AND FINDINGS

[12] Before dealing with the defendant's grounds of appeal it is perhaps necessary to examine the grounds relied on by the defendant in their application to set aside the said ex parte order (encl 6): D

- (a) O 69 r 8(2) of the Rules of Court 2012 ('the ROC') was not complied with by the plaintiff; E
- (b) failure by the plaintiff to candidly state that the only positive order made in the final award dated 25 September 2013 was the question of costs which was an issue that had yet to be determined by the Arbitral Tribunal; and F
- (c) failure by the plaintiff to candidly admit that there was a dispute over the interpretation of the final award namely whether the plaintiff could insist on remaining on the Board when his own position was that he was not bound by the variation of the shareholders' agreement ('SA'). G

[13] As can be seen from the above, the defendant's grounds of appeal is an expansion of the grounds it relied on to set aside the said ex parte order.

[14] The crux of the defendant's appeal is that there was non-compliance with the mandatory requirements of O 69 r 8(2)(b) of the ROC which rendered the said ex parte order liable to be set aside. H

[15] The learned judge according to the defendant had therefore erred in law in dismissing the application to set aside the said ex parte order, as it had misinterpreted the purport of ss 38 and 39 of the AA and O 69 r 8(2)(b) of the ROC. I

[16] Before dealing with the crux of the appeal as outlined above, it would be convenient to deal with the issue of the plaintiff's *failure to give a full and frank*

A *disclosure* first as this is basically an issue of fact (see para 4 of the defendant's grounds of appeal) and grounds (b) and (c) of the defendant's application to set aside the said *ex parte* order (above).

B [17] The law on the recognition and enforcement of an arbitration award is provided for under s 38(1) of the AA. This section states that on an application in writing to the High Court an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign state shall, subject to that section and s 39 of the AA be recognised as binding and be enforced by entry as a judgment in terms of the award or by action. The manner in which such application is to be made is set out in O 69 r 8(1) which stipulates that an application for permission to enforce an award in the same manner as a judgment or an order may be made without notice that is, on an *ex parte* basis by way of an arbitration claim originating summons. ('originating summons').

D [18] Under O 69 r 8(2), the originating summons shall state the following:

E (a) the name and the usual or last known place of abode or business of the applicant, and the respondent against whom it is sought to enforce the award, respectively; and

(b) *either that the award has not been complied with or the extent to which it has not been complied with* at the date of the application. (Emphasis added.)

F For our purposes, para (b) (above) is the relevant provision.

[19] Apart from the abovementioned requirement and consonant with the requirements of s 38(2) of the AA, O 69 r 8(3) requires the following documents to be produced:

G (a) the duly authenticated original award or a duly certified copy of the award; and

(b) the original arbitration agreement or a duly certified copy of the agreement before the court can grant an order for recognition and enforcement of the award.

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[20] It is not disputed that the aforesaid formal requirements of O 69 r 8(3) have been complied with by the plaintiff.

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[21] As regards the contention that the plaintiff had failed to provide full and frank disclosure by failing to state that the only positive order made in the final award was the issue of costs, the plaintiff did, in their originating summons state that the final award substantively denies the claims or relief sought by the

defendant against the plaintiff rather than directing specific positive action, save in respect of payment of costs (see para 10 of the plaintiff's affidavit in support, p 4, ROA (*Jld 2 — Bah B and C*)).

A

[22] On the defendant's contention that the plaintiff had failed to candidly admit that there was a dispute over the interpretation of the final award, as submitted by learned counsel for the plaintiff, it can be seen from encl 1 itself and the affidavits in support that it was the defendant themselves who had raised the question with regards to the interpretation of the final award when they filed the s 35 (of the AA) application for clarification (see *Bah A, Jld 1*, encl 1, item (f), p 29 record of appeal ('ROA'), *Bah B, Jld 2*, encl 2 para 10.3, p 48; ROA — *Bah B, Jld 2*, encl (2) exh P6, pp 202–205).

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[23] The defendant subsequently withdrew the s 35 application and as submitted by the plaintiff the final award stands in its original terms.

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[24] On this issue of failure to provide full and frank disclosure raised by the defendant, we agree with the learned judge that based on the facts and documentary evidence as shown above, the defendant's contention was clearly without merit. The requirement of O 69 r 8(2)(b) of the ROC read together with s 38 of the AA in this regard had been complied by the plaintiff.

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[25] The plaintiff's submission was that he had in the same para 10 set out in detail the events that had taken place since the issuance of the final award including the defendant's request at the material time that the plaintiff voluntarily step down from the Board of Directors of the defendant's.

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[26] We reproduce below para 10:

10.1 On 7.11.2013, the Defendant through its solicitors sent an urgent facsimile to Messrs. Harry Elias Partnership, my solicitors in the arbitration proceedings requesting that I voluntarily step down from the Board of the Defendant.

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10.2 I responded to this facsimile through Messrs. Harry Elias Partnership's letter dated 12.11.2013 addressed to the Defendant's solicitors.

10.3 On 19.11.2013 the Defendant made an application to the Sole Arbitration under section 35 of the Arbitration Act 2005 ('Section 35 Application').

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10.4 By a letter dated 22.11.2013 Messrs. Harry Elias Partnership wrote to the Sole Arbitrator to set out my stand on the Defendant's Section 35 Application.

I verily believe that as at the date of the Affidavit, the Final Award remains, in form and in content as set out in Exhibit 'P-3'.

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10.5 I state that to my knowledge, no determination has been made by the Sole Arbitrator on the Defendant's Section 35 Application.

10.6 The quantum of costs payable by the Defendant to me in respect of the arbitration has yet to be determined.

- A [27] The events narrated above show the extent to which the defendant has not complied with the final award. Given the nature of the award itself the plaintiff claimed he had sufficiently complied with the provision of O 69 r 8(2)(b) which required him to:
- B state *either* that the award has not been complied with *or the extent to which it has not been complied with at the date of the application*.
- [28] The plaintiff's contention found favour with the learned judge who held as follows:
- C In para 10 of the affidavit in support the plaintiff has stated (*sic*) detail the extent to which the final award has not been complied with as at the date of the said application for recognition and enforcement of the award as required pursuant to O 69 r 8(2) of the ROC. Therefore the plaintiff has complied with the requirement as provided under O 69 r 8(2) of the ROC for recognition and enforcement of the
- D final award.
- [29] The defendant disagreed with the learned judge's finding alleging that the defendant's intention to remove the plaintiff was not an example of non-compliance bearing in mind that the final award itself was open to interpretation.
- E
- [30] Learned counsel for the defendant argued that the learned judge had failed to give due consideration to the fact that the final award did not make any positive ruling (which was capable of being enforced) except in relation to costs which was pending taxation by the Arbitration Tribunal at the time the plaintiff filed its application under s 38 of the AA.
- F
- [31] By the time encl 6 was heard, these costs had been taxed and paid. Thus in the defendant's view there was nothing which was capable of being enforced (or otherwise not complied with) and 'accordingly, no utility to the plaintiff's application save the tactical purpose of bolstering his claim in the Shah Alam Proceedings'. The Shah Alam proceedings referred to by counsel relates to the proceedings filed by the plaintiff in the Shah Alam High Court (Originating Summons No 396 of 2014) seeking relief under s 181 of the Companies Act 1965, based on, inter alia, the ex parte order.
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- H
- [32] Now coming to the crux of the defendant's appeal that there had been non-compliance with the mandatory requirements in that there had been no non-compliance with the final award as required by O 69 r 8(2)(b). Learned counsel submitted that the pre-requisite for such a requirement of non-compliance with the final award is that there must be a positive order.
- I

[33] In this regard it was counsel's contention that the requirement under the said order that the applicant must plead non-compliance of the award, necessarily implies that a *positive order* is a pre-requisite before a court can grant recognition and enforcement of an arbitral award. In fact the expression 'enforcement' requires some positive order made by the award which needs to be enforced for a purpose.

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[34] Learned counsel cited the case of *Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbertriebe Registrierte Genossenschaft Mit Beschränkter Haftung* [1953] 2 All ER 1039, where the English High Court recognised that to enforce an award, the plaintiff must show that there was something positive in the award that had not been complied with as seen from the passage of Devlin J's (as he then was) judgment below:

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To succeed, therefore, the plaintiffs first ... the making of the contract which contains the submission; secondly ... that the dispute which arose was within the terms of the submission; thirdly, that arbitrators were appointed in accordance with the clause that contains the submission; fourthly, ... the making of the award; and, lastly, ... the *amount awarded has not been paid*.

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[35] Learned counsel further contended that it is settled law that a declaratory judgment or award is not capable of execution or enforcement as held by the Federal Court in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 3)* [2010] 2 MLJ 141 when it concluded as follows:

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There is an added point in so far as staying the effect of the principal judgment is concerned. All that judgment does, inter alia, is to hold that the appellant is a beneficiary under a constructive trust of which the second respondent is a trustee. In short it declares the existence of a constructive trust. It makes no positive order. The weakness of the remedy of declaration lies in the want of its enforceability. A declaration cannot be enforced by execution. In *Prakash Chand v SS Grewal* (1975) Cri LJ 679, the court held as follows:

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A declaratory decree cannot be executed as it only declares the rights of the decree-holder qua the judgement-debtor and does not, in terms, direct the judgement-debtor to do or to refrain from doing any particular act or things. Since there is no command issued to the judgement-debtor to obey, the civil process cannot be issued for the compliance of that mandate or command.

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In other words, there can be no committal or other execution process issued to enforce a declaration.

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[36] Learned counsel for the defendant pointed out that the position is the same in other jurisdictions citing in support the Indian case of *Potti Venkata Kasi Viswanadham v Vallabha Vyas* AIR 1983 AP 64 in which the court held as follows:

- A In so far as the decree in question is concerned, in my judgment, it is a declaratory decree simpliciter. I do not find any ambiguity whatsoever in the decree so as to spell out as to what it contains. It merely confers the title in regard to the right of light and air to the plaintiff and it also says that he is entitled to an injunction restraining the opposite party from interfering with. But, then there is no positive direction along
- B with the declaration of the right, for the implementation of the said order prescribing the course of action in case the order and directions are not implemented.
- C [37] In this regard, learned counsel argued that if a declaratory award is incapable of enforcement then a fortiori a negative declaratory award (such as in the present case) cannot be enforced.
- D [38] The reason, according to learned counsel is because the act of enforcement envisages *some purpose or utility to it*, the most common of which is to secure the material benefit of preventing an inconsistent judgment being given by a court in another jurisdiction as held by the English Court of Appeal in *West Tankers Inc v Allianz Spa, The Front Comor* [2012] 2 All ER (Comm) 113; [2012] EWCA Civ 27. In this case, the arbitral award was in the form of
- E a negative declaration. The arbitration tribunal held that the successful party was under no legal liability to the other party (the claimant).
- F [39] Learned counsel submitted that the Court of Appeal had upheld the decision and reasoning of Field J who concluded thus:
- G The purpose of s 66(1) and (2) is to provide a means by which the victorious party in an arbitration can obtain the *material benefit* of the award in his favour other than by suing on it. *Where the award is in the nature of a declaration and there is no appreciable risk of the losing party obtaining an inconsistent judgment* in a member state which he might try to enforce within the jurisdiction, leave will not generally
- H stand to be granted because the victorious party will not thereby obtain any benefit which he does not already have by virtue of the award per se. In short, in such a case, the grant of leave will not facilitate the realization of the benefit of the award. Where, however, as here, the victorious party's objective in obtaining an order under s 66(1) and (2) is to establish the primacy of a declaratory award over an inconsistent judgment, the court will have jurisdiction to make a s 66 order because to do so will be to make a positive contribution to the securing of the material benefit of the award. (Emphasis added.)
- I [40] Learned counsel also drew the court's attention to the Court of Appeal's opinion that a declaratory judgment is not 'executory' in form in that it does not formally order either party to do or to refrain from doing anything in support of its contention that the High Court erred in holding that a negative declaratory order can be enforced under O 69 r 8(b).

[41] Further reliance was placed by learned counsel for the defendant, inter alia: A

(a) *Tridon Australia Pty Ltd v ACD Tridon Inc (Inc in Ontario)* [2004] NSWCA 146; and

(b) *London Steam Ship Owners Mutual Insurance Association Ltd v Kingdom of Spain and another* [2013] All ER (D) 299 (Oct); [2013] EWHC 3188 (Comm). B

[42] Consequently learned counsel submitted that the learned judge was plainly in error when she held that a negative declaratory award could be enforced as the plaintiff had not shown what utility or benefit could be gained by the plaintiff in having the award enforced. C

[43] In rejecting the proposition that the plaintiff must show some benefit or utility that could be derived from enforcing an arbitral award, the learned judge opined that ‘in an application made pursuant to the said s 38, the applicant need only to produce the following document: (i) the duly authenticated original award or a duly certified copy of the award; and (ii) the original arbitration agreement or a duly certified copy of the agreement, to enable the court to grant an order for recognition and enforcement’. D E

[44] Learned counsel contended that in holding so, the learned judge ‘had effectively reduced the court’s role to no more than one of rubber-stamping applications under s 38’. F

[45] Her Ladyship’s view, according to counsel was inconsistent with the position in other jurisdictions which recognised that the court has a discretion in deciding whether to enforce an award. G

[46] The following decisions of the Calcutta High Court and the Patna High Court respectively reflect this position:

(a) *Soorajmull Nagarmal v Golden Fibre and Products* AIR 1969 Cal 381; and H

(b) *Deo Narain Singh and Ors v Siabar Singh* AIR 1952 Pat 461.

[47] On this issue which as we had stated earlier forms the crux of the plaintiff’s appeal before us, it is important that we restate the legal regime governing the recognition and enforcement of arbitral awards in Malaysia, viz, ss 38–39 of the AA and O 69 r 8 of the ROC. I

Section 38(1) of the AA provides:

- A** (1) On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.
- B** For such purpose, s 38(2) sets out the formal requirements that has to be complied with:
- (2) In an application under subsection (1) the applicant shall produce —
- C** (a) the duly authenticated original award or a duly certified copy of the award; and
- (b) the original arbitration agreement or a duly certified copy of the agreement.
- D** [48] Section 39(1) on the other hand, sets out the various grounds upon which the recognition and enforcement of an arbitral award may be refused and it states as follows:
- (1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked —
- E** (a) where that party provides to the High Court proof that —
- (i) a party to the arbitration agreement was under any incapacity;
- (ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the State where the award was made;
- F** (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;
- (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
- G** (v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration;
- (vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or
- H** (vii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
- I** (b) if the High Court finds that —
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

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[49] The application to enforce on arbitral award under s 38(1) must be made in accordance with O 69 r 8 of the ROC which stipulates thus:

(1) On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.

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(2) In an application under subsection (1) the applicant shall produce —

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(a) the duly authenticated original award or a duly certified copy of the award; and

(b) the original arbitration agreement or a duly certified copy of the agreement.

D

[50] As provided in r 8(1), the application which is by way of originating sums may be made ex parte (without notice) which was the case here.

[51] Learned counsel for the defendant contended as one of his grounds of appeal that the learned judge fell into error when she failed to appreciate that there is a two stage approach in dealing with applications for recognition and enforcement under s 38 of the AA. Under this two stage approach, the plaintiff (or applicant) must first, satisfy the requirement of s 38 read together with O 69 r 8(2)(b) of the ROC. Only after these requirements have been met or satisfied can the applicant proceed to the second stage, where s 39 of the AA then becomes relevant.

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[52] The learned judge in the defendant's view has misdirected herself when she proceeded to consider s 39 without first properly determining whether the plaintiff had complied with the requirements of the first stage (ie O 69 r 8(2)(b) read together with s 38 of the AA). In the present case, the defendant's contention was that the plaintiff had fail to pass the first stage, therefore s 39 of the AA did not arise.

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[53] We are, with due respect unable to agree with learned counsel for the defendant that an application for recognition and enforcement under s 38 of the AA involves a two-stage approach in the manner suggested by learned counsel. The case of *Agrovenus LLP* relied on by learned counsel does not support the plaintiff's proposition.

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[54] This is clear from the judgment of the Court of Appeal, which, whilst appearing to suggest that there is a two-stage approach to the recognition and

- A** enforcement of an arbitral award under s 38 nevertheless accepted that a formalistic approach by simply producing the arbitration agreement and the arbitration award would provide sufficient compliance with the requirements of s 38. It is then for the party opposing the recognition and enforcement to satisfy the court of one of the grounds set out in s 39(1)(a)(i)–(1)(a)(vii) of the AA. This was how the Court of Appeal put it:
- B**

C [13] In our view, s 38 reflects the obvious. An applicant for recognition or enforcement of an award must first satisfy the court that there is an award and an arbitration agreement that authorised it. That would show if the tribunal that made the award sought to be recognised and enforced is the tribunal referred to in the arbitration agreement. Although an objection as to jurisdiction of the arbitral tribunal could be argued on the basis of the terms of the arbitration agreement, we accept that a formalistic approach to compliance with s 38, by production of the copy of the award and the sale contract of 3 April 2009 relating to the transaction in dispute and containing an arbitration agreement suffices under s 38 as prima facie proof.

D [14] We held the view that the second stage is s 39, which deals with the request and grounds relied upon for refusal of the recognition or enforcement sought, and that this second stage is where questions relating to jurisdiction of the arbitral tribunal as well as whether, inter alia, the arbitral tribunal exceeded its jurisdiction or dealt with any dispute not contemplated or not falling within the terms of the submission to arbitration may properly be addressed.

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[55] Thus the learned judge did not err or misdirected herself when she held, inter alia, as follows:

- F** As such in an application made pursuant to the said section, the Applicant need only to produce the following documents:
- G** (i) the duly authenticated original award or a duly certified copy of the award; and
 - (ii) the original arbitration agreement or a duly certified copy of the agreement to enable the court to grant cum order for recognition and enforcement.

H [56] Having satisfied herself that the formal requirements of s 38 of the AA have been complied with Her Ladyship then went on consider the provisions of s 39 as seen below:

I The grounds for refusal of recognition are exhaustive and if none of the grounds are present, the award must necessarily be recognised. Enclosure 6 is an application by the defendant to set aside the order to recognise and enforce the said final award and not an application to set aside the said final award pursuant to s 39 of the AA.

[57] The defendant's position as alluded to earlier is that an application for recognition and enforcement under s 38 of the AA requires the court to determine firstly whether:

(a) the final award carries a *positive order* which requires the assistance of the court to enforce the award; and A

(b) there has been compliance with O 69 r 8(2)(b) of the ROC ie that the affidavit in support of the application must state either that the award has been complied with or the extent to which it has not been complied with at the date of the application. In other words the plaintiff must show in their affidavit that there has been non-compliance with the (final) award. B

[58] Only after the court has determined that these two conditions have been satisfied can the court grant leave to enforce under O 69 r 8 of the ROC read with s 38 of the AA. After having satisfied itself that these two conditions have been fulfilled, the court will then proceed to consider the applicability of s 39 of the AA. The defendant submitted that in granting leave to enforce an arbitral award under s 38 of the AA, the court does not, as opined by the learned judge in her judgment (paras 55 and 56 *ante*) just ‘act robotically’ (see *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 282 ALR 717) nor is the court merely undertaking ‘an administrative rubber-stamping exercise’ when exercising its powers therein (see *West Tankers Inc*). C D E

[59] For the reasons stated earlier we would disagree with the defendant’s position that an application for recognition and enforcement under s 38 of the AA and under O 69 r 8(2)(b) involves a two stage process as contended above. F

[60] Neither could we agree with learned counsel for the defendant’s contention that the learned judge in the judgment appears to treat the application under O 69 r 8(2)(b) as an ‘administrative rubber stamping exercise’ or ‘acting robotically’ when considering an application under that order read together with s 38 of the AA. G

[61] It is clear from her judgment that after satisfying herself that the formal requirement of O 69 r 8(2)(b) have been complied with, the learned judge will then have to consider whether there are grounds for refusing to recognise the award (under s 39 of the AA) before deciding whether to grant permission to recognise and enforce the judgment under the said order read with s 38 of the AA. H

[62] We have considered learned counsel for the defendant’s submission that: I

(a) the plaintiff has not complied with the allegedly mandatory requirements of O 69 r 8(2)(b):

(i) O 69 r 8(2)(b) requires the plaintiff to state either the award has been

- A complied with or the extent to which it has not been complied with at the date of the application;
- (ii) such a requirement necessarily implies that a *positive order* is a pre-requisite for recognition and enforcement under O 69 r 8(2)(b) read together with s 38 of the AA;
- B (iii) the purpose of enforcing an arbitral award is to secure a material benefit or utility for the plaintiff; and
- (iv) a declaratory award in particular a negative declaratory award such as in
- C the present case is not capable of enforcement or recognition as it does not confer any material benefit or utility to the plaintiff. It merely declares a party's rights.
- D [63] The learned judge, had therefore, according to the defendant, erred in holding that a negative declaratory order is enforceable under O 69 r 8(2)(b) of the ROC.
- E [64] We are, with respect, unable to agree with learned counsel for the defendant's submission.
- [65] As a starting point and by way of recapitulation we would like to emphasise again the clear and unambiguous words of s 38(1) of the AA which provides that:
- F On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign state *shall*, subject to this action and section 39 *be recognised as binding and be enforced* by entry as a judgment in terms of the award or by action. (Emphasis added.)
- G [66] The only formal requirements required for the recognition and enforcement of an arbitration award by entry as a judgment of the High Court under s 38(2) are, as we have been earlier, the production of:
- H (a) the duly authenticated original award or a duly certified copy of the award; and
- (b) the original arbitration agreement or a duly certified copy of the agreement.
- I [67] It is not disputed that these requirements have been complied with. Section 39 of the AA sets out the grounds upon which an award may be refused recognition or enforcement (see para 48 *ante*).
- [68] Thus it would appear from s 38(1) that so long as the formal

requirements of that section are complied with and absent any ground(s) under s 39 upon which recognition and enforcement may be refused, it is incumbent on the court to grant recognition and enforcement of an arbitration award upon such an application being made to the High Court under that section (in other words, see *Kelana Erat Sdn Bhd v Niche Properties Sdn Bhd and another application* [2012] 5 MLJ 809; *Bauer (M) Sdn Bhd v Embassy Court Sdn Bhd* [2010] MLJU 1323; [2010] 1 LNS 1260 para 17, *Agrovenus, Sisma Enterprise Sdn Bhd v Solstad Offshore Asia Pacific Ltd* [2013] MLJU 1625; [2013] 1 LNS 335).

[69] In this regard we had earlier expressed the view that an application for recognition and enforcement under s 38(1) of the AA is not a two step approach as contended by the plaintiff. Rather as we have shown above the court when deciding whether or not to recognise and enforce the final award under s 38(1) will have to consider, apart from the formal requirements of s 38(1) of the AA, whether any of the ground(s) under s 39(1) of the AA apply. After having satisfied itself that the requirements of s 38(1) have been complied with and there are no grounds under s 39(1) for refusing to recognise and enforce the award, it is then mandatory for the court to recognise and enforce the (final) award.

[70] Thus in relation to the plaintiff's application (encl 6), when is the subject matter of this appeal, the question that arises is whether the plaintiff has raised and satisfied one of the grounds under s 39(1) of the AA in order for the court to refuse the recognition of the award by setting aside the 4 March 2014 order.

[71] If we were to examine the grounds raised by the defendant in their application, it is immediately clear that the defendant has failed to raise any ground which falls under s 39(1) of the AA. In fact, as pointed out by learned counsel for the plaintiff, the defendant does not even appear to rely on s 39. It is of course settled law that the onus of establishing a ground(s) under s 39 of the AA in order to set aside the 4 March 2014 order is with the plaintiff (see *Open Type Joint Stock Co Efirnoye ('EFKO') v Alfa Trading Ltd* [2012] 1 MLJ 685 at paras 23–24 and *Ngo Chew Hong Oils & Fats (M) Sdn Bhd v Karya Rumpun Sdn Bhd* [2009] MLJU 1335; [2009] 1 LNS 1321).

[72] We agree with the defendant that s 39(1) of the AA is exhaustive in respect of the basis for refusal to recognise and enforce an arbitration award. The failure of the plaintiff to raise any of these exhaustive grounds must necessarily mean that the learned judge was right in dismissing encl 6 (see *Kelana Erat* and *Bauer*).

[73] The plaintiff however is seeking to set aside the 4 March 2014 order not

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- A on any of the grounds set out in s 39 of the AA, as indicated earlier, but on the somewhat nebulous ground of non-compliance with O 69 r 8(2) of the ROC read together with s 38(1) of the AA.
- B [74] We had in this regard requested counsel to consider the principles of interpretation applicable to the question of whether or not O 69 r 8(2)(b) of the ROC imposes a substantive requirement of non-compliance as contended by the defendant and if it does whether such a construction can be read harmoniously with ss 38–39 of the AA.
- C [75] The substantive requirement referred to by the defendant (the requirement of question) is that the plaintiff must show in his application for recognition and enforcement either that the award has not been complied with or the extent to which it has not been complied with at the date of the application.
- D [76] We have considered carefully the submissions advanced by both counsel in respect of this issue and we find ourselves in agreement with the plaintiff's submission, the gist of which is as follows.
- E *Section 38 and 39 of the AA are meant to be exhaustive*
- F [77] *There is no room for any other substantive requirement to be fulfilled for the recognition and enforcement of an arbitration award* (see *Hari Bhadur Gale v Public Prosecutor* [2012] 6 MLJ 597 where the Federal Court laid down the principles of statutory interpretation. The principles laid down therein are also reflected in the subsequent Court of Appeal decision of *Magudar bin Ambit v Rambilin bt Ambit & Ors* [2014] 5 MLJ 873 at pp 885–886).
- G [78] Further, s 17A of the Interpretation Acts 1948 and 1967 provides that in interpreting a statutory provision, the court should ascertain the intention of Parliament in relation to the said provision.
- H [79] The following principles therefore can be distilled from the above authorities, in interpreting the provisions of a statute:
- I (a) the meaning of the words in the statutes must be ascertained;
- (b) if the words are unambiguous, plain and clear they must be given their natural and ordinary meaning; and
- (c) if the words are ambiguous, a purposive approach to interpretation ought to be adopted.
- [80] The crucial section in our case is s 38(1) of the AA which stipulates in

clear and unequivocal terms as follows:

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On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State *shall*, subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action. (Emphasis added.)

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[81] As can be seen the only requirements under s 38(2) of the AA for the purposes of recognising and enforcing an arbitration award by entry as a judgment of the High Court are as follows:

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In an application under subsection (1) the applicant shall produce —

- (a) the duly authenticated original award or a duly certified copy of the award; and
- (b) the original arbitration agreement or a duly certified copy of the agreement.

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[82] The grounds upon which an arbitration award may be refused recognition and enforcement are set out in s 39(1). These grounds (nine altogether) as stated earlier are exhaustive.

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[83] The word ‘shall’ in s 38(1) of the AA is, as the word denotes, a mandatory requirement (see *Low Cheng Soon v TA Securities Sdn Bhd* [2003] 1 MLJ 389 and *Yap Teck Ngian v Yap Hong Lang @ Yap Fong Mei & Ors* [2006] 6 MLJ 607).

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[84] As the word ‘shall’ in s 38 of the AA denotes a mandatory requirement it therefore means that there is no room for the exercise of any discretionary power by the High Court if both substantive requirements in that section are fulfilled (which is the case here) and there are no grounds for refusal of recognition and enforcement under s 39 of the AA.

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[85] It is not disputed that the defendant fulfilled the requirements under s 38(1) and (2) of the AA. Further, it is not disputed that the plaintiff did not raise any ground under s 39 of the AA. Further, there is no ‘general ground’ which would allow the High Court room to exercise its discretion to set aside an arbitration award. Therefore, the award ‘shall’ be recognised and enforced by entry as a judgment of the court under s 38(1) of the AA.

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[86] The defendant’s counsel contended that if there was no discretion granted to the court to refuse recognition and enforcement of an arbitration award, the court would simply be engaged in ‘rubber stamping’ and that cannot be the case. We have stated earlier that we disagree with counsel’s contention.

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A [87] In our view, the court does have a significant role to play. The court determines if s 38 of the AA is satisfied and if any circumstances exist under s 39 of the AA. In particular, the court may refuse recognition and enforcement under s 39(1)(b) of the AA if the High Court finds that a subject matter is incapable of being settled by arbitration under Malaysian laws or if the award is in conflict with the public policy of Malaysia. To suggest that the court would merely be engaged in a 'rubber stamping' exercise if it is would vested with any discretion is wholly inaccurate.

C [88] Thus, based on the unambiguous and clear wording of the AA, the only by substantive requirements to be fulfilled are set out in the AA itself. The requirement in question contained in the Rules of Court 2012, cannot by virtue if the clear words of s 38 be construed as a substantive requirement.

D [89] Even if one were to contend that the wording of s 38 of the AA is ambiguous or lacks clarity (which is certainly not the case here) adopting a purposive approach (s 17A of the Interpretation Acts 1948 and 1967) would generate the same result, that is, that the only substantive requirements for the recognition and enforcement of an award are found in the AA (see *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 at p 360).

E [90] Parliament's intent in enacting the AA in 2005 may be discerned through a reading of the Hansard dated 7 December 2005 ('Hansard') where at the second and third readings of the Arbitration Bill 2005 in Parliament, the Minister stated as follows:

F Semasa menggubal Rang Undang-undang Timbang Tara 2005, undang-undang timbang tara di Negara lain seperti Singapura, New Zealand, India Kanada, dan United Kingdom telah dikaji. Rang Undang-Undang Timbang Tara 2005 yang dicadangkan ini telah mengadaptasikan Model Law untuk disesuaikan dengan keadaan di Malaysia seperti yang telah dilakukan oleh negara-negara itu.

G Akta Konvensyen Mengenai Pengiktirafan dan Penguatkuasaan Award Timbang Tara Asing 1985, Akta 320 membolehkan Award Timbang Tara yang dibuat di luar Malaysia dikuatkuasakan di Malaysia. Peruntukan Akta 320 telah disatukan dalam Rang Undang- Undang Timbang Tara 2005.

H [91] As can be seen from the above, Parliament enacted the AA in place of the Arbitration Act 1952 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ('the CREFA') as a 'user friendly' Act for parties intending to settle matters through arbitration to lighten the burden in relation to the number of cases pending in court as well as to draw in international disputes to be settled by arbitration in this country.

I [92] If ss 38–39 of the AA did not contain all substantive requirements and if subsidiary legislation (like the Rules of Court 2012) or the courts could

impose further conditions for the recognition and enforcement of awards, this necessarily render awards less effective.

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[93] More critically an interpretation of ss 38–39 of the AA to the effect that these do not contain all substantive requirements, would be contrary to the clear intent of Parliament which is to encourage recourse to arbitration as a means of settling disputes.

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[94] It is also pertinent to note that articles 35 and 36 of the UNCITRAL Model Law on International Commercial Arbitration 1985, upon which the AA was modelled, provide the conditions under which an arbitration award should be recognised and enforced in the competent courts and the grounds for refusing such recognition and enforcement.

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Article 35 and Article 36 reads as follows:

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Articles 35 Recognition and enforcement

- (1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.
- (2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.

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Article 36 Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

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- (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
 - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitrator proceedings or was otherwise unable to present his case; or
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to

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- A arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
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- (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
- C
- (b) if the court finds that:
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
- D
- (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

E [95] The provisions of articles 35 and 36 above are incorporated into ss 38–39 of the AA. Had Parliament intended that the requirement in question be a condition precedent to the recognition and enforcement of arbitration awards, it could have included the same into the AA. Therefore it is plain that the requirement in question was never intended to be a substantive requirement for the recognition and enforcement of an arbitration award.

F [96] In the light of the above, irrespective of whether we accept that the wording of the AA is clear or whether a purposive approach is adopted or whether comparison is made with other statutes, the result is the same, that is, all substantive requirements for recognition and enforcement of an arbitration award are contained within the AA. Applying these principles to the facts of this case it is undisputed that the plaintiff has fulfilled these substantive requirements.

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H [97] Thus as submitted by the plaintiff it is not possible for the requirement in question to be read harmoniously with the AA if such provision is read to impose a further substantive requirements.

The requirement in question is a mere procedural requirement and non-compliance is not fatal

I [98] We concur with plaintiff's counsel that the Rules of Court 2012 merely sets out the procedural means to obtain enforcement and recognition of an arbitration award, and O 69 r 8(2)(b) cannot be elevated to a substantive requirement. This is demonstrably clear from the following provisions:

- (a) under O 2 r 1(1) of the Rules of Court 2012, 'non-compliance' with the requirements of the Rules 'shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment of order therein'; and A
- (b) O 2 r 1(2) of the Rules of Court 2012, is a reminder that the Rules are a 'procedural code and subject to the overriding objective of enabling the Court to deal with cases justly' (see *Leftenan Kolonel Abdul Aziz bin Buyong & Anor v Raja Petra bin Raja Kamarudin* [2012] MLJU 1347). B

The defendant referred to us the case of *Lee Teng Siong v Lee Kheng Lian & Ors* [2006] 5 MLJ 609; [2006] 4 CLJ 443 in support of its contention that the requirement in question is not just procedural but is in fact jurisdictional. C

[99] In the aforesaid case, the Court of Appeal held that the court's jurisdiction to grant summary judgment was provided by the Rules of High Court. However in the present case the jurisdiction of the High Court to recognise and enforce awards is provided under the AA ie by an Act of Parliament. The AA sets out in clear terms the substantive requirements to obtain recognition and enforcement. Order 69 r 8 of the ROC merely provides the procedural means for such recognition and enforcement under the AA. D
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[100] Further, as submitted by learned counsel for the plaintiff, unlike O 14 and O 81 as considered in *Lee Teng Siong* s 38 of the AA and O 69 r 8 of the ROC are not, as counsel puts it 'mutually exclusive' provisions. O 69 is clearly subordinate to s 38 of the AA. Hence any non-compliance can be rectified or remedied vide O 2 r 2 of the ROC in the interest of justice. F

[101] In any event as we had found earlier the plaintiff had in fact complied with the requirement in question as at the date of the application (see para 10 of the plaintiff's affidavit in support). G

The requirement in question in the ROC cannot exceed the jurisdiction or powers granted by the statute ie the AA H

[102] It is not disputed that the ROC constitute subsidiary legislation as it was created not by Parliament but by the Rules Committee and the Subordinate Courts Rules Committee (see s 17(1) of the Courts of Judicature Act 1964 (CJA and the Preamble to the ROC)). I

[103] The ROC, as stipulated in s 16(a) of the CJA provide for procedural and related matters; and not substantive requirements. As subsidiary legislation the ROC may not be inconsistent with or exceed the powers conferred by the enabling statute (see *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku*

- A *Ibrahim* [2008] 3 MLJ 753 at p 767 and *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 at p 222).

B [104] In *Sia Cheng Soon*, the Federal Court held that r 137 of the Rules of the Federal Court does not confer new jurisdiction when none existed before under the CJA.

C [105] In the final analysis subsidiary legislation can only act within the framework of the primary legislation ie the AA. In imposing further substantive requirement under O 69 r 8(2)(b), the defendant is seeking to add to the substantive requirements already provided under ss 38–39 of the AA.

D [106] We agree with the plaintiff that the requirement in question if construed as a substantive requirement is inconsistent with the AA and limit the rights to recognition and enforcement of an arbitration award under the AA. Such an interpretation in our view cannot be upheld.

Sections 38 and 39 of the AA override any purported common law principle

E [107] In support of the defendant's argument that the requirement in question is a substantive requirement the non-compliance of which is fatal to an application for recognition and enforcement under s 38 of the AA, the defendant contended that an arbitration award ought not to be recognised and enforced unless:

- F (a) it carries a *positive order* (otherwise the question of non-compliance as required by O 69 r 8(2)(b) of the ROC does not arise); and
(b) it confers a *material benefit or utility* to the applicant (the plaintiff in this case).

G [108] As set out in this judgment the defendant relied on the following authorities for the aforesaid proposition:

- H (a) the English High Court cases of *Christopher Brown* and *London Steam Ship Owners Mutual Insurance*;
(b) the English Court of Appeal case of *West Tankers Inc*; and
(c) the Australian case of *Tridon*.

I [109] The defendant argued that as the final award is only a negative declaration which does not confer any material benefit to the plaintiff, the award ought not to be registered (recognised) and enforced.

[110] In this regard, the defendant submitted that it is settled law, based on

the decision of the Federal Court in *Takako Sakao* that a declaratory judgment or award is not capable of execution or enforcement.

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[111] On the requirement that the final award must carry a *positive order*, the learned judge discussed this issue at length in her judgment stating as follows:

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Similarly the AA is an act that sets out the law relating to arbitration including the recognition and enforcement of the awards and related matters. The ROC on the other hand, regulates and prescribes the civil procedure and practice to be followed in the High Court. Similarly s 38 of the AA gives the power to the court to grant leave for an award to be recognised and enforced. There is no prerequisite that there must be a positive order before action can be taken as suggested by learned counsel for the defendant. As such in an application made pursuant to the said section, the applicant need only to produce the following documents:

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- (i) the duly authenticated original award or a duly certified copy of the award; and
- (ii) the original arbitration agreement or a duly certified copy of the agreement, to enable the court to grant an order for recognition and enforcement.

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[112] Her Ladyship then discussed the definition of award under s 2 of the AA and referred to the learned authors Rashda Rana & Michelle Sanson's book *International Commercial Arbitration* on what recognition and enforcement of an arbitral award entails and concluded as follows:

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There must be judicial recognition of the arbitral award. The grounds for refusal of recognition are exhaustive and if none of the ground are present, the award must necessarily be recognised. Enclosure 6 is an application by the Defendant to set aside the Order to recognise and enforce the said Final Award and not an application to set aside the said Final Award pursuant to section 39 AA. The Plaintiff has the right by law to apply for judicial recognition of the Final Award pursuant to section 38 AA notwithstanding that the Award may be declaratory in nature and/or without any positive order. In *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 CLJ 743, the Federal Court of Malaysia regarded as 'well settled' law that an arbitration award is final, binding and conclusive and can only be challenged in exceptional circumstances. Siti Norma FCJ states in this case:

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The law regarding the effect of an arbitration's award is well settled in that the award is final, binding and conclusive and can only be challenged in exceptional circumstances.

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[113] Learned counsel for the plaintiff maintained that the learned judge had rightly decided that there is 'no prerequisite that there must be a positive order' before an action can be taken to recognise and enforce an arbitration award.

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[114] We see no reason to disagree with the plaintiff's submission or to depart from the learned judge's finding.

A [115] As for the case of *Takako Sakao* it was pointed out to us that *Takako Sakao* was not concerned with an application for recognition or enforcement of arbitral award. What the Federal Court said, in passing, was that a declaratory judgment cannot be enforced in the context of staying a judgment. The Federal Court did not address the meaning of recognition and enforcement in the context of an arbitral award. It is therefore not applicable to our present case. Furthermore it bears regarding that s 38 of the AA expressly sets out how the arbitration award is to be recognised and enforced, that is by 'entry as a judgment'.

C [116] It would appear, as submitted by learned counsel for the plaintiff that the defendant by imposing the requirement for a *positive order* and the conferment of a *material benefit or utility*, is seeking to apply common law principles in relation to the recognition and enforcement of arbitral awards.

D [117] The question for our consideration is whether the court can apply common law principles where the statute is clear. The Court of Appeal in *Dominic Chin Joon Siong v Public Prosecutor* [2008] 3 MLJ 24 held:

E [60] In its wisdom, Parliament in exercise of its legislative powers, is entitled to enact any written law, provided that it is neither inconsistent with nor repugnant to the supreme law enshrined in the Federal Constitution. *It is within the legislative competence of Parliament to enact any written law to replace, displace or even overrule any common law rule.* This has been illustrated in limitless statutory presumptions which have the effect of reversing the burden of proof in criminal cases. (Emphasis added.)

F [118] Based on the Court of Appeal's pronouncement we would agree with learned counsel for the plaintiff that 'ss 38 and 39 AA which are enacted by Parliament for the purpose of registration and enforcement of an arbitration award does not provide space for the application of any common law principle to circumscribe the application of the AA'.

G [119] In his submission before us learned counsel for the defendant asserted that reading the requirement in question as imposing a substantive requirement and further imposing a requirement that (arbitration) awards must direct positive action would bring Malaysia in line with other Commonwealth countries.

I THE POSITION IN OTHER COMMONWEALTH COUNTRIES

[120] However based on counsel's further submission on the position in other Commonwealth countries it would appear that the statutory regime in relation to the recognition and enforcement of arbitration awards in those countries differ somewhat from ours. In general, it is observed that:

- (a) the empowering or enabling provision of the law in some of the Commonwealth countries allows discretion to the courts (unlike our s 38 of the AA) to impose further requirements for recognition and enforcement of an award; A
 - (b) the body of case law in some of the countries which draw distinctions between positive awards (enforceable) and declaratory awards (not enforceable except where there is *material benefit or utility*) have been developed only because of that discretion granted to the Courts in those countries. The body of case law does not however appear to directly address the question of whether or not there has been non-compliance with the award prior to enforcement; and B
 - (c) even where such discretion exists in other countries (and this is not uniformly the case), the courts have found that declaratory awards can be enforced if there is a utility or benefit to doing so. C
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[121] With regard to the position in *England*, it was defendant's counsel's contention that the position in *England* is that the court would not enforce a declaratory award as there is no material benefit to be gained by the enforcement of the award. The case of *West Tankers* was relied on by counsel as authority for this proposition. E

[122] Section 66 of the English Arbitration Act 1996 sets out the regime in relation to the enforcement of an arbitration award and it reads as follows:

- (1) An award made by the tribunal pursuant to an arbitration agreement *may, by leave of the court*, be enforced in the same manner as a judgment or order of the court to the same effect. F
- (2) Where leave is so given, judgment may be entered in terms of the award.
- (3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award. The right to raise such an objection may have been lost (see section 73). (Emphasis added.) G

[123] In view of the wording of s 66 of the English Arbitration Act 1996 which uses the word 'may' as opposed to the word 'shall', in our s 38 of the AA, the *West Tankers* case can be distinguished as s 66 confers on the English court the discretion whether to enforce an arbitration award as judgment whereas no such broad discretion is granted to our courts under ss 38 and 39 of the AA. H

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[124] Further, *West Tankers* turned on the interpretation of the phrase 'enforced in the same manner as a judgment to the same effect' found in s 66(1) of the English Arbitration Act 1996. Our s 38 of the AA does not contain such

- A similar wording. Our court is not asked to consider the means of enforcement since the AA is clear that an award is to be both recognised and enforced by entry as a judgment of the court.
- B [125] In any event as pointed out by learned counsel for the plaintiff *West Tankers* cannot entirely be relied on to support the defendant's proposition that an award which is purely declaratory in nature will not be enforced by the English court. This is evident from the judgment of the Court of Appeal (see below) which dismissed the appeal against the decision of the High Court dismissing the defendant's application to set aside an order for leave to enforce an arbitration award which was purely declaratory in nature.
- C [35] The question is whether the phrase 'enforced in the same manner as a judgment to the same effect' is confined to enforcement by one of the normal forms of execution of a judgment which are proved under the rules or whether it may include other means of giving judicial force to the award on the same footing as a judgment.
- D [36] The broader interpretation is closer to the purpose of the 1996 Act and makes better sense in the context of the way in which arbitration works. Ultimately the efficacy of an award by an arbitral body depends on the assistance of the judicial system, as Lord Hobhouse observed. Judges may give force to an arbitral award by a number of means, including by applying the doctrine of issue estoppel.
- E [37] *At common law a party to an arbitration who has obtained a declaratory award in his favour could bring an action on the award and the court, if it thought appropriate, could itself make a declaration in the same terms.* The purpose of s 66 is to provide a simpler alternative route to bringing an action on the award, although the latter possibility is expressly preserved by s 66(4). *I cannot see why in an appropriate case the court may not give leave for an arbitral award to be enforced in the same manner as might be achieved by an action on the award and so give leave for judgment to be entered in the terms of the award.* (Emphasis added.)
- F
- G [126] The case of *London Steam Ship Owners* cited by the defendant in support of their contention makes it clear that the discretionary power of the English courts in enforcing an arbitration award rests on the use of the word 'may' in s 66 of the English Arbitration Act 1966 as seen from the following passage of the court's judgment:
- H On an application under s 66 the court has a discretion whether or not to enforce the award — it 'may' do so.
- I [127] It is also not completely accurate for the defendant to suggest that a negative declaration has neither material benefit nor utility to the winning party. In *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041; [2003] UKPC 11 the Privy Council made the following observation:

- [9] The other factor to be taken into account is more fundamental. The essential purpose of arbitration is to determine disputes between the parties to the arbitration. Historically this was what the function of arbitrators was to say who was right. *The decision of the arbitrators could*, as a result of the authority given to the arbitrator by the parties' agreed submission to arbitration, *declare what were the rights and liabilities of the parties and bind the parties by that declaration*. Enforcement lay with the courts. Common law remedies were available besides statutory ones ... A
- [14] For the purpose of evaluating this argument, one must assume that the plea of issue estoppel is *prima facie* sound — that the issue was decided in the previous award as part of the necessary reasoning of the arbitrators in determining the dispute submitted to them. On this hypothesis, the decision was a decision which decided as between Aegis and European Re what was the correct construction of art X of the reinsurance agreement. It established what were the rights of the parties under that article. *Ex hypothesi*, Aegis are seeking in the second arbitration to dispute that the parties have those rights, contrary to the earlier award. How can European Re enforce the earlier decision? The answer is by pleading an issue estoppel. (Emphasis added.) B
- [128] Thus as illustrated by the aforesaid case, irrespective of whether a declaration is negative or positive in nature, the fact that an arbitrator has made a finding is crucial for the purposes of *res judicata* and issue estoppel. C
- [129] In the case of *Christopher Brown Ltd* which the defendant cited in support of the fact that a positive order is a prerequisite for enforcement the issue turned on whether the dispute fell outside the terms of the submission (to arbitration). The statement of the court that the plaintiff must prove that the amount awarded has not been paid is purely obiter and therefore irrelevant for the purposes of our case. D
- [130] To sum up, it is clear from the above that the position in the UK does not support the defendant's proposition as: E
- (a) express discretion is given to the UK Courts as to whether or not to enforce an award. The word 'may' is used in the empowering statute as opposed to the word 'shall' employed in our AA. It is because of this that case law has developed in the UK that only certain types of awards are to be enforced; F
 - (b) the AA refers to recognition and enforcement of an award by entry as a judgment of the High Court. In other words, the manner of recognition and enforcement is already provided for in the AA; G
 - (c) the UK Act refers only to enforcement whereas s 38 of the AA speaks of recognition and enforcement; and H
 - (d) the UK position also seems to be that declaratory awards can be enforced if there is material benefit. It can be argued in the present case that there is material benefit since the defendant has not complied with the award. I

A [131] The defendant had also cited the Australian case of *Tridon* in support of its position. However as with the UK position, the governing law in New South Wales at the material time, clearly provides for the recognition and enforcement of arbitration awards to be discretionary. Section 33 of the Commercial Arbitration Act 1984 stipulates that:

B an award ... *may*, by *leave* of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect ... (Emphasis added.)

In view of that the court in New South Wales may refuse leave to enforce an arbitration award.

C [132] The Commercial Arbitration Act 1984 was subsequently repealed and replaced by the Commercial Arbitration Act 2010 which provides under s 35(1), 'An arbitral award, irrespective of the State or Territory in which it was made, is to be recognised in this state as binding and, on application in writing to the Court, is to be enforced subject to the provisions of this section and section 36'. Section 36, is similar to our s 39 of the AA and provides for the grounds for refusing recognition or enforcement of an arbitration award.

E [133] Learned counsel for the plaintiff had also cited to us the case of *AED Oil Ltd v Puffin FPSO Ltd* [2010] VSCA 37 a decision of the Victoria Supreme Court. Similar to the Commercial Arbitration Act 1984 applicable in New South Wales at the material time, s 33 of the Victorian Commercial Arbitration Act 1984, (the law applicable then) bore the same wording as s 33 of the former. In other words the court in Victoria had the discretion to refuse to grant leave.

G [134] The significance of this case is that the court there rejected Puffin's argument that a declaration contained in an arbitral award is unlikely to be recognised and enforced as judgment and therefore the parties intended to free themselves to enable them to seek declaratory relief from a court. The Supreme Court followed an earlier Australian authority and held, *inter alia*, as follows:

H [20] There is Australian authority which support the proposition that declaratory awards made by arbitrators are enforceable. In *Electra Air Conditioning BV v Seeley International Pty Ltd*, the Full Court of the Federal Court said (at [42] and [44]):

It may be assumed that an arbitrator can make an award which contains injunctive or declaratory relief provided that the arbitration agreement signed by the parties gives the arbitrator that power ...

I We think the Model Law gives an arbitrator appointed under that law power to make an order in the nature of an injunction and, if necessary, a declaration.

As with the Commercial Arbitration Act 1984, the Victorian Commercial Arbitration Act 1984 have now been repealed and replaced by the Commercial Arbitration Act 2010.

[135] Based on the above, the position in two of the Australian states, ie New South Wales and Victoria (as set out in *Tridon* and *AED Oil Ltd* respectively (above)) clearly differ from that of our law (ie s 38 of the AA) as the provisions of the governing law at the material time in those jurisdictions confer on the courts the discretion to refuse leave.

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[136] Be that as it may as we have shown above, the Australian cases have held that declaratory awards are enforceable.

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[137] With the enactment of the Commercial Arbitration Act 2010, it would appear that Australia too is moving away from its earlier position of allowing courts the discretion in respect of the recognition and enforcement of arbitration awards, towards a position which is more in line with the UNCITRAL Model Law.

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[138] The position in *Hong Kong* is similar to the position in the UK in that their courts are granted the discretionary power when deciding whether to grant leave to enforce an arbitration award. Section 84 of the Arbitration Ordinance 2010 states as follows:

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- (1) Subject to section 26(2), an award, whether made in or outside Hong Kong, in arbitral proceedings by an arbitral tribunal is enforceable in the same manner as a judgment of the Court that has the same effect, but only with the leave of the Court.
- (2) If leave is granted under subsection (1), the Court may enter judgment in terms of the award ...

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The latest Hong Kong Arbitration Ordinance 2013 contains similar wording to s 84.

[139] In *Singapore*, the Singapore Arbitration Act, in relation to the enforcement of a domestic arbitration award stipulates as follows:

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46(1) An award made by the arbitral tribunal pursuant to an arbitration agreement may, with leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect.

(2) Where leave of the Court is so granted, judgment may be entered in the terms of the award ...

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The provisions governing enforcement of an international arbitration award, are set out in the Singapore International Arbitration Act, the relevant provisions states as follows:

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19 An award on an arbitration agreement *may, by leave* of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award.

...

- A** 29(1) Subject to this Part, a foreign award may be enforced in a court either by action or in the same manner as an award of an arbitrator made in Singapore is enforceable under section 19.
- B** (2) Any foreign award which is enforceable under subsection (1) shall be recognised as binding for all purposes upon the persons between whom it was made and may accordingly be relied upon by any of those parties by way of defence, set-off or otherwise in any legal proceedings in Singapore.
- 30(1) In any proceedings in which a person seeks to enforce a foreign award by virtue of this Part, he shall produce to the court —
- C** (a) the duly authenticated original award or a duly certified copy thereof;
- (b) the original arbitration agreement under which the award purports to have been made, or a duly certified copy thereof; and
- D** (c) where the award or agreement is in a foreign language, a translation of it in the English language, duly certified in English as a correct translation by a sworn translator or by an official or by a diplomatic or consular agent of the country in which the award was made. (Emphasis added.)
- E** [140] Thus, as quite rightly pointed out by learned counsel for the plaintiff the provisions governing the enforcement of arbitration awards in Singapore, whether they are domestic or international arbitration awards, are somewhat similar to the English provisions as they confer some discretion to the courts, unlike the position in Malaysia. As such their cases may not be directly applicable to the present case.
- F** [141] Having said that it would appear from the decision of the Singapore High Court in *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] 3 SLR 174 that the court would only allow enforcement to be refused if the defendant is able to establish one of the grounds set out in s 31(2) of the International Arbitration Act. To quote the learned judge:
- G** ... As the enforcement court, I can only permit Mr. Chiew to resist enforcement if he is able to establish one of the grounds set out in s 31(2) of the Act.
- H** Section 31(2)(b) of the International Arbitration Act sets out the grounds for refusal of enforcement of an arbitration award which are similar to the grounds laid down in s 39 of our AA.
- I** [142] From the above it would appear that the Singapore courts did not draw any distinction between types of awards or require non-compliance before an award will be recognised and enforced (see also *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2010] 3 SLR 661).
- [143] Finally, as the defendant had relied on the Indian case of *Potti Venkata*,

in support of their contention that a declaratory arbitral award is not enforceable, learned counsel for the plaintiff drew our attention to s 36 of the Indian Arbitration and Conciliation Act 1996 to highlight to us the position in *India* on this matter. Section 36 states as follows:

36 Enforcement — Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be endorsed under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.

As can be seen from the above provision, the position in *India* as regards enforcement of arbitration awards is similar if not the same as the position in Malaysia.

[144] This is apparent from the judgment of Madras High Court in the case of *Sundaram Brake Linings Ltd v Kotak Mahindra Bank Ltd* A No 8078 of 2007 at para 38 where the court recognised that the Arbitration and Conciliation Act 1996 is adopted (be it fully or with modifications) from the UNCITRAL Model Law, and compared the provisions in the Act to the Model Law.

[145] In comparing s 36 of the Act to the equivalent article in the Model Law, ie Articles 35 and 36, the Indian Court recognised that, based on the wording in s 36, the Act deviates from the Model Law ‘in the sense that the Act does not provide for the refusal to recognise or enforce an arbitral award’.

[146] From the Indian Act and the *Sundaram* case above, it can be safely concluded that as that no room for discretion is given to the Indian courts. It would appear long as an arbitration award is not set aside, the recognition and enforcement of the award is mandatory as the Indian Act does not provide any ground for refusal.

[147] The case of *Potti Venkata* cited by the defendant is not concerned with the application for recognition or enforcement of arbitral awards. It concerns a decree for mandatory injunction granted by the court but which lacked material particulars, which rendered the court unable to execute the same in the absence of such particulars.

[148] It is therefore not directly relevant for the purpose of our case as it did not address the meaning of recognition and enforcement in the context of an arbitral award.

CONCLUSION

[149] The learned judge did not err when she dismissed encl 6; as the plaintiff had fully complied with the requirements under ss 38–39 of the AA as well as

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A O 69 r 8(2) of the ROC.

The defendant did not challenge the final award on any of the grounds listed under s 39 of the AA nor did the defendant apply to set aside the final award.

B [150] Sections 38–39 of the AA are meant to be exhaustive. There is no room for any other substantive requirements to be satisfied for the recognition and enforcement of an arbitration award under the AA.**C** [151] The requirement in question (O 69 r 2(2)(b) of the ROC) is merely a procedural requirement. It is not a substantive requirement, non-compliance of which is fatal to an application for recognition and enforcement.**D** [152] The defendant's assertion that the following common law principles be applied in an application for recognition and enforcement under s 38 of the AA, viz:

(a) an arbitration award in the form of a negative declaration which purportedly has no material benefit or utility to the recipient of the award cannot be recognised and enforced; and

E (b) (hence) the need for a positive order in the arbitral award, is not sustainable as such additional requirements are not contemplated by the legislation.**F** In any event as we have seen above courts in England and Australia have granted leave to enforce arbitral awards which are declaratory in nature.**G** [153] The aforesaid common law principles were developed by the English courts as the law governing the enforcement of arbitration awards (s 66 of the Arbitration Act 1996), confers broad discretion on the courts. These common law principles were adopted and applied by those jurisdictions in the Commonwealth whose statutory regime in respect of the enforcement of arbitration awards are similar to that of the UK such as Hong Kong, Australia and Singapore.**H** [154] No such discretion is conferred on our courts based on the mandatory language of s 38 of the AA.**I** [155] Whilst O 69 r 8(2)(b) of the ROC uses the word 'permission', it cannot be construed such as to confer discretion on the court in the same manner that discretion is conferred on the courts in UK, Singapore and to a certain extent Australia. The discretion conferred on the courts in those jurisdictions are provided for in the statute itself not in subsidiary legislation as in the case here. To construe it as such would render the provision (O 69 r 8(2)(b)) inconsistent with and in conflict with the clear words of s 38 of the AA. The word

‘permission’ in O 69 r 8(2)(b) of the ROC is, in the context of the AA, merely formalistic.

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[156] Finally, it is our view that if the requirement in question is construed as imposing a substantial requirement in an application for it would lead to the diminishment of arbitration awards and their utility which recognition and enforcement would be contrary to the intent of the AA.

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[157] For the above reasons, we are constrained to dismiss the appeal with costs. The learned judge came to the right conclusion that despite the final award being declaratory in nature and/or without positive order, the plaintiff has the right under law to apply for judicial recognition of the final award as the plaintiff had fulfilled all the necessary requirements under the law.

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Nallini Pathmanathan JCA (delivering dissenting judgment of the court):

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INTRODUCTION

[158] This appeal concerns the construction of s 38 of the Arbitration Act 2005 (‘the Act’) read together with O 69 r 8 of the Rules of Court 2012 (‘the RC 2012’) in relation to the registration and enforcement of an arbitration award. On the somewhat unique facts of this case, the arbitral award in question made no positive order capable of enforcement, save as to costs, and that too remained to be determined as to quantum, at the material time of registration of the award.

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[159] The substance of the award instead refused the grant of several declarations sought at the behest of the appellant above, Tune Talk Sdn Bhd (‘the appellant’) who was the claimant in the arbitration proceedings. The net result of the arbitration award was that the appellant, in its capacity as the claimant, failed in its bid to procure several declarations to the effect that Padda Gurtaj Singh (‘the respondent’) in the arbitration proceedings could no longer remain a director of the appellant, given several conditions that subsisted between the parties.

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[160] In the award the arbitral tribunal took the view that the terms of certain conditional consents by the shareholders of the appellant, were ineffectual against the respondent as they were not specifically agreed to, or signed by him. The award therefore had the net effect of failing to grant the declarations sought by the appellant in relation to the respondent’s designation as a director of the appellant. In short, there was no positive act or declaration granted under the terms of the final award, save for costs, which as was stated earlier, had not been quantified.

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A [161] In these circumstances, the respondent under the arbitration proceedings sought recognition and enforcement of the orders made in the arbitration, notwithstanding that no positive declarations or relief had been granted in his favour. The respondent sought in effect the enforcement of the negative declarations, as it were, under s 38 of the Act. An ex parte order of registration and enforcement was granted by the High Court on 4 March 2014 and served on the appellant on 25 March 2014.

C [162] The appellant sought to set aside the order maintaining, inter alia, that O 69 r 8(2)(b) of the RC 2012 had not been complied with, and that the respondent had failed to provide full and frank disclosure. The thrust of the argument on behalf of the appellant was that O 69 r 8 of the RC 2012 read together with s 38 of the Act comprised the jurisdictional basis for the registration and enforcement of an award. To that extent it was contended for the appellant that O 69 r 8 of the RC 2012 is jurisdictional in nature, rather than purely procedural. As such compliance with that rule of court could not simply be ignored. For ease of reference, O 69 r 8 of the RC 2012 provides as follows:

- E (1) An application for *permission to enforce an award* in the same manner as a judgment or an order may be made without notice in an arbitration claim originating summons.
- (2) The arbitration claim originating summons shall —
- F (a) state the name and the usual or last known place of abode or business of the applicant and the respondent against who it is sought to enforce the award respectively; and
- (b) state *either that the award has not been complied with or the extent to which it has not been complied with at the date of the application.* (Emphasis added.)

G [163] In essence it was the appellant's case that in the registration and enforcement of an arbitral award, the registering High Court had to ensure compliance with the foregoing rule of court, which envisaged that:

- H (a) registration was ultimately for the purposes of facilitating enforcement;
- (b) there had to be some positive act or thing that required compliance; and
- (c) where there was nothing that required compliance, the High Court could exercise its discretion to refuse registration, as there was nothing or
- I no act to enforce.

[164] For the respondent it was contended to the contrary, that it was s 38 of the Act which set out expressly the specific conditions that had to be met in order to register and enforce an arbitral award. There was no room, given the

specific wording of s 38 of the Act for the court to exercise any form of discretion in determining whether or not to register an award. Again, for ease of reference s 38 of the Act provides as follows:

38 Recognition and enforcement

(1) On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.

(2) In an application under subsection (1) the applicant shall produce —

- (a) the duly authenticated original award or a duly certified copy of the award; and
- (b) the original arbitration agreement or a duly certified copy of the agreement ...

[165] In other words, so long as the duly authenticated original or a duly certified copy of the award and the agreement to arbitrate are produced before the court, the court is constrained to register the award for enforcement. The court in effect, it was contended, executed a function as literally set out in the provisions of the Act and left no room for the court to exercise any form of discretion in the registration of an award.

[166] As for O 69 r 8 of the RC 2012, it was contended for the respondent, that the same was redundant and need not be given effect. This was because of the mandatory nature of s 38 of the Act, which was entirely distinguishable from its equipollent provisions in other jurisdictions, which were permissive in nature. Distinctions were drawn between the legislation in England, Australia, Singapore and a variety of other jurisdictions.

[167] It was further contended for the respondent that upon a perusal of s 39 of the Act, it was clear beyond argument that recognition or enforcement of an award could only be refused at the behest of the party against whom it was invoked in the specific instances set out in the situations envisaged in s 39(1)(a)(i)–(a)(vii) and (b) of the Act.

[168] Suffice to say that it is undisputed that the appellant does not invoke any of these situations under s 39 of the Act in order to set aside the registration of the award. Instead, the appellant maintains that it is entitled to set aside the registration of the award, primarily on the grounds that there is nothing to register or enforce under s 38 of the Act, because the award essentially refused the declarations sought by the appellant, not the respondent. The latter was not the claimant or recipient of any form of relief, but was the successful party under the award. This in turn meant that there was nothing positive for the respondent to enforce for purposes of the registration of the judgment.

- A [169] The argument for the necessity of complying with O 69 r 8 of the RC 2012, as set out above, was invoked on behalf of the appellant to substantiate the proposition that the said order ought to be read harmoniously with ss 38 and 39 of the Act. Taken together they confer jurisdiction upon the court to register and enforce an arbitral award. To that extent it was contended that
- B O 69 r 8, like O 14 and O 81 of the RC 2012, is jurisdictional (see *Lee Teng Siong v Lee Kheng Lian & Ors* [2006] 5 MLJ 609; [2006] 4 CLJ 443).

ISSUES FOR DETERMINATION IN THIS APPEAL

- C [170] The primary issue for determination in this appeal is the interpretation to be accorded to ss 38–39 of the Act as well as O 69 r 8 of the RC 2012. More specifically the issue is whether compliance with O 69 r 8 of the RC 2012 as well as ss 38–39 of the Act is required, such that all three provisions are read
- D harmoniously, or whether ss 38–39 of the Act are mandatory whereas compliance with O 69 r 8 of the RC 2012 is not necessary.

- E [171] If s 38 of the Act is to be read harmoniously with O 69 r 8(2)(b) of the RC 2012 (as well as s 39 of the Act), this would then confer some degree of discretion on the court to examine an arbitral award with a view to ascertaining whether the award confers any act or thing capable of enforcement.

- F [172] In other words the court would be entitled, under the permissive wording in O 69 r 8(2)(b) of the RC 2012 to exercise its discretion and consider whether or not there is any act or thing in the arbitral award that requires enforcement.

- G [173] If there is no such positive act capable of enforcement then it would be open to the court in the exercise of this discretion to refuse to register the award on the grounds that there is nothing capable of enforcement, thereby rendering registration a futile or useless act. The binding nature of the arbitral award as between the parties would however remain.

- H [174] If on the other hand O 69 r 8(2)(b) of the RC 2012 is construed as a mere adjectival requirement or proviso which does not require compliance or is simply viewed as redundant, then the converse would follow, namely that the High Court would be constrained to register an award notwithstanding its content or nature, so long simply as the requirements of s 38 of the Act were met.

- I BACKGROUND FACTS

[175] As stated in the arbitral award, the dispute is between the appellant and the respondent who is a shareholder and director of the company. It arose over

an alleged breach of the shareholder agreement dated 23 December 2008 ('the shareholders agreement') and subsequent conditional consents said to have been agreed between the parties. The respondent is a minority shareholder and director of the appellant.

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[176] Under the shareholders' agreement the respondent's right to remain as a director of the appellant was conditional upon, inter alia, his employment with the company.

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[177] Under cl 12.2(a) of the shareholders' agreement, the respondent had undertaken with the appellant not to 'carry on or be engaged or interested in any business in competition with the activities and operations carried on by the company in South East Asia ...'. Any breach of this clause would result, pursuant to cl 10.2, to a compulsory transfer of all the respondent's shares.

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[178] The respondent resigned from the appellant in 2009. The other shareholders of the appellant granted the respondent an exemption from having to comply with cl 12.2(a) of the agreement on condition that the respondent remains a shareholder. But they imposed another condition, namely that the respondent had to vacate his seat of director if he is associated 'with another company in the mobile telecommunication industry'. This condition which was imposed vide a series of documents referred to as the consent documents, was signed by all the shareholders and all the directors of the appellant with the exception of the respondent. He had refused and took no steps to sign the consent documents.

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[179] Then on 1 January 2010, the respondent joined a company known as Spice Bulls in Singapore as its president of mergers and acquisitions, without notifying the appellant. A show cause letter was issued to the respondent where, inter alia, the appellant through its chief executive officer stated that it had come to their attention that the respondent was providing services to 'Spice Global' and his directorship could be revoked if he was found providing services to another telecommunications company. The respondent maintained that Spice Global was not a mobile telecommunications provider. However, the appellant did not accept this contention.

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[180] A dispute arose and this led to the commencement of arbitration pursuant to cl 16 of the shareholder's agreement, which contained an arbitration clause specifying the Regional Center for Arbitration Kuala Lumpur and applying UNCITRAL Rules.

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[181] In the arbitration proceedings, the sole claim was by the appellant and this was dismissed. The arbitral tribunal took the view that the terms of the

- A** conditional consents by the shareholders were ineffectual against the respondent as they were not specifically agreed to, or signed off by him.
- B** [182] On 25 September 2013, the appellant's claim was dismissed with no positive orders made save for costs, which was to be assessed by the arbitral tribunal in the future.
- C** [183] The appellant then passed a directors' circular resolution in November 2013 to convene an Extraordinary General Meeting ('EGM') for shareholders to consider passing a resolution to formally revoke the earlier consents. Consequently, they would then have to consider and vote on whether to remove the respondent as a director of the appellant. If the respondent did not have effective consent, then the original provisions of the shareholders' agreement would apply.
- D** [184] On 7 November 2013 the appellant through its solicitors then requested that the respondent voluntarily resign from the board of directors. On 12 November 2013, the respondent rejected the request.
- E** [185] On 4 February 2014, the respondent filed an ex parte application under s 38 of the Act as well as O 69 r 8 of the RC 2012 for recognition and enforcement of the award by entry as a judgment of the High Court. The application expressly recognised that the award made no positive orders and the only matter in relation to which enforcement might be available was that of costs, which had yet to be assessed. In short, there was nothing to specifically enforce under the arbitral award.
- F**
- G** [186] A month later on 4 March 2014, the respondent obtained the ex parte order.
- H** [187] On 25 March 2014, the directors of the appellant passed a further directors' circular resolution to convene an EGM for its shareholders to consider revoking earlier consents and whether or not to remove the respondent as a director of the appellant. The circular resolution was duly passed and notice of an EGM was given for 9 April 2014 to all relevant parties including the respondent. At this time, the ex parte order for registration of the award as a judgment was served on the appellant.
- I** [188] The notice of the EGM on 9 April 2014 prompted the respondent to initiate separate proceedings seeking relief under s 181 of the Companies Act 1965.

[189] On 7 April 2014 the appellant applied to set aside the ex parte order for registration of the arbitral award dated 4 March 2014. One of the grounds of the application was that the arbitral tribunal did not make any positive orders and there had not been compliance with O 69 r 8(2)(b) of the RC 2012. Additionally, it was maintained that the respondent had failed in his duty to provide full and frank disclosure of the fact that the sole positive order made was in relation to costs, which had yet to be assessed by the tribunal.

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[190] On 9 April 2014 the EGM was adjourned to 16 April 2014. The respondent did not appear on the adjourned date and was duly removed as a director of the appellant.

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[191] The appellant's application to set aside the registration of the arbitral award was heard in July 2014 and dismissed in September 2014.

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THE DECISION OF THE HIGH COURT

[192] The learned High Court judge dismissed the appellant's application to set aside the registration and enforcement of the arbitral award. The thrust of Her Ladyship's reasoning for doing so, which we have adopted from the submissions of learned counsel for the appellant's, is as follows:

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- (a) the respondent had in fact complied with his duty of full and frank disclosure by stating that the arbitral award did not make a positive order against the appellant, save in respect of costs;
- (b) O 69 r 8(2)(b) of the RC 2012 comprised a procedural requirement which had to be read together with s 38 of the Act. It was sufficient that the respondent had complied with s 38 of the Act;
- (c) there is no prerequisite for a positive order before a court can grant recognition and enforcement of an arbitral award. An order that is declaratory may therefore be recognised and enforced; and
- (d) recognition and enforcement of an arbitral award may be refused only under one of the grounds set out in s 39 of the Act.

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SUBMISSIONS OF COUNSEL IN THE COURT OF APPEAL

[193] For the appellant, the appellant, it was contended by learned counsel Mr Logan Sabapathy that the learned High Court judge had erred in her conclusions by reason of the following matters.

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[194] There had been insufficient appreciation of the purpose of O 69 r 8(2)(b) of the RC 2012. It was not merely procedural. It had moreover to be read in harmony with s 38 of the Act.

- A [195] As stated at the outset, it was contended that O 69 r 8(b) like O 14 and O 81 of the RC 2012 is jurisdictional in nature, rather than purely procedural. As such, it had to be read in conjunction with s 38 of the Act in a situation where it was sought to recognise and enforce an arbitral award.
- B [196] There had been a failure to appreciate that a positive order is a prerequisite for recognition and enforcement. As stated by the Federal Court in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 3)* [2010] 2 MLJ 141 where a declaratory judgment was granted, no positive order ensued. The weakness of the remedy of declaration lies in the want of its enforceability. A declaration cannot be enforced by execution. In like manner in the instant case, there was a refusal to grant certain declarations at the behest of the appellant. So there is nothing to execute on the part of the winning party, the respondent (*see also West Tankers Inc v Allianz Spa, The Front Comor* [2012] 2 All ER (Comm) 113; [2012] EWCA Civ 27 (see IA(P) 1, Tab 7, pp 56–57 where the arbitral award took the form of a negative declaration). In short, the appellant maintained that the learned High Court judge erred in holding that a negative declaratory award could be enforced. It was pointed out that there had been no consideration as to the utility or benefit to be derived from the enforcement of the award. The respondent had stated only that the appellant's intention to remove him from the board of directors was an example of non-compliance with the award. However, this was refuted by the appellant on the grounds that the award was open to interpretation and could not comprise an example of non-compliance.
- F [197] The fact that the appellant was taking new steps to consider the removal of the respondent as a director was in relation to events arising subsequent to the arbitral award, and in respect of which therefore, there was no bar. The arbitral award, which was binding between the parties to the dispute, related specifically to whether the respondent was party to, or had signed off on the conditional consents. As the respondent maintained that he had not, the conditional consents were not binding on him which allowed the shareholders to then consider whether the original terms of the shareholders' agreement required that he resign or be removed as a director, given his having left the employment of the appellant and his having joined Spice Global.
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- I [198] The proper approach to be adopted in dealing with applications for registration and enforcement is by meeting the requirements of s 38 of the Act read together with O 69 r 8(2)(b) of the RC 2012, rather than solely meeting the requirements of s 38 of the Act. Once the applicant has crossed this threshold only does the second stage arise, namely whether any of the situations in s 39 of the Act apply (*see Agrovendus LLP v Pacific Inter-Link Sdn Bhd and another appeal* [2014] 3 MLJ 648 at paras 13–15). This it is contended the learned High Court judge failed to do without giving due consideration as to

whether the appellant had satisfied the requirements of the first stage.

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[199] The ex parte application for registration and enforcement of the award imposed a duty on the respondent to make full and frank disclosure of all relevant material. It was contended that the respondent had failed to state expressly that there was a dispute over the interpretation of the award, which meant that he was aware of the possibility that the award recognised that the variation of the shareholders' agreement vide the consents was not operative or effective and he was therefore not entitled to remain on the board in accordance with the original provisions of the shareholders' agreement. The respondent also failed to disclose the existence of the director's resolution whereby the appellant was proposing to put the question of his removal to its shareholders and that it was entitled to do so.

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[200] For the respondent on the other hand, learned counsel Ms Shamala Balasundram contended vigorously that ss 38–39 of the Act are exhaustive. There was no room for any other substantive requirements to be satisfied for the recognition and enforcement of an arbitration award. Learned counsel for the respondent further maintained that O 69 r 8(2)(b) of the RC 2012 is a procedural requirement and not a substantive requirement. Therefore it followed that any non-compliance with the provision in question would not render an application to recognise and enforce an award fatal. Further and alternatively, learned counsel maintained that there was compliance as far as was possible with the procedural requirements as well as full and frank disclosure.

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[201] Thirdly, it was submitted that any common law principle asserted by the appellant namely that an arbitration award in the form of a negative declaration which has no material benefit to the winning party cannot be enforced for example, cannot override clear statutory provisions such as ss 38–39 of the Act. Any such decision by this court, it was contended, would lead to the weakening and diminishment of arbitration awards and their utility, contrary to the intent of the Act.

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[202] It was further pointed out that the purpose of the Act ought to be ascertained in interpreting ss 38–39. In this context this involved an examination of the words in the statutes to ascertain their meaning. If the words are unambiguous, plain and clear, they had to be given their ordinary and actual meaning and if the words are ambiguous a purposive approach ought to be applied.

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[203] Applying the foregoing it was contended by learned counsel that the exhaustive provisions for recognition and enforcement are to be found in s 38

A of the Act. The use of the word ‘shall’ denotes a mandatory requirement that must be adhered to.

B [204] More importantly it was pointed out that the word ‘shall’ in s 38 of the Act means that there is no room for the exercise of discretionary power by the High Court provided the two substantive requirements in s 38 of the Act are fulfilled, and there are no grounds for refusal of recognition and enforcement under s 39 of the Act. There is no ‘general ground’, which would allow the High Court room to exercise its discretion to set aside an arbitration award. While learned counsel did not see this as ‘rubber stamping’ as contended by learned
C counsel for the appellant, it was submitted that in registering and enforcing the award, the High Court would be applying the provisions of the Act as drafted and mandated by Parliament. In any event, the court did have a significant role to play in that it could refuse recognition and enforcement under s 39 of the Act.

D [205] This court was also asked to consider the implications of invoking O 69 r 8(2)(b) of the RC 2012 as a substantive requirement to the registration and enforcement of arbitral awards. If this order is construed as a necessary pre-requisite to the registration of an award then, it was submitted, arbitration
E awards must not contain anything that is merely declaratory or amounts to a negative declaration. In this context, all awards had to set out positive acts requiring compliance in order for them to be recognised and enforced by the Malaysian courts. Thus if a claim is dismissed in arbitration the successful party cannot seek the protection of the Malaysian courts.
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[206] It would also follow that the successful party to arbitration must wait until there has been non-compliance with the award before the award can be recognised and enforced.

G [207] Learned counsel also undertook a comprehensive review of legislation in other Commonwealth countries, pointing out that while registration and enforcement is permissive in other jurisdictions, it is mandatory in this jurisdiction.

H DECISION OF THIS COURT

[208] As pointed out earlier the primary issues that arise for consideration before this court on appeal are as follows:

- I (a) for the purposes of registration and enforcement of an arbitral award, whether compliance with O 69 r 8 of the RC 2012 as well as ss 38–39 of the Act is required, such that all three provisions are read harmoniously, or whether ss 38–39 of the Act are mandatory and exhaustive, whereas compliance with O 69 r 8 of the RC 2012 is not necessary;

- (b) secondly, in the somewhat unusual situation where an arbitral award does not grant the successful party any relief capable of enforcement, is it tenable for the registering court to exercise its discretion to refuse summary registration and enforcement because the court finds it unnecessary; or alternatively A
- (c) whether the registering court is mandatorily bound to register the arbitral award provided the stipulations or conditions in s 38 of the Act are met. B

CONSTRUCTION OF S 38 OF THE ACT AND O 69 R 8(2)(B) OF THE RULES OF COURT 2012 C

[209] In determining the foregoing, it is necessary to consider whether O 69 r 8(2)(b) of the RC 2012 can be read harmoniously with s 38 of the Act or whether the said order is simply a procedural requirement which can be ignored? D

[210] In *R v O'Brien and another* [1985] 1 All ER 971 at 975 and *Raymond v Honey* [1983] 1 AC 1 at pp 12–13 it was held by the High Court and House of Lords respectively (in the United Kingdom) that where subsidiary legislation is ambiguous, one possible effect being ultra vires and the other intra vires, preference should be given to the latter construction. E

[211] Moreover s 17A of the Interpretation Acts 1948 and 1967 was applied by the Federal Court in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97 as follows: F

... When construing a taxing or other statute, the sole function of the court is to discover the true intention of Parliament. In that process the court is under a duty to adopt an approach that produces neither injustice nor absurdity: in other words an approach that promotes the purpose or object underlying the particular statute albeit that such purpose or object is not expressly set out therein ... G

And in the Indian case of *Maharashtra SBOS & HS Education v Paritosh Bhupesh Kumar Sheth* 1984 AIR 1543 it was held as follows: H

The provisions contained in a statutory enactment or in rules/regulations framed thereunder have to be so construed as to be in harmony with each other ...

[212] As such the preferred approach to be adopted, if possible, is that O 69 r 8(2)(b) of the RC 2012 be read harmoniously with ss 38–39 of the Act, rather than the rule of court being construed as redundant. Any such construction however should support and promote the purpose of the statute, namely the Arbitration Act 2005. I

- A** [213] Order 69 r 8(2)(b) of the RC 2012 when read together with s 38 of the Act discloses/makes clear the following:
- (a) the purpose of the Act as set out in the preamble is to recognise and enforce arbitral awards;
- B** (b) the court cannot promote the purpose of the Act without knowledge of the non-compliance against which recognition and enforcement is needed;
- C** (c) O 69 r 8(2)(b) of the RC 2012 comes into play by requiring that non-compliance be pleaded; and
- D** (d) O 69 r 8(2)(b) of the RC 2012 requires such non-compliance be pleaded in order that enforcement may ensue to protect the successful party from the other party's refusal or threatened refusal to comply with the terms of the arbitral award.
- E** [214] There is a distinction between 'recognition' and 'enforcement' of an award. An award may be recognised without being enforced. Where it is enforced, however, it must necessarily have been registered. Therefore, the true distinction is between registration and registration and enforcement (see *Redfern and Hunter on International Arbitration* (5th Ed, OUP 2009) at para 11.20).
- F** [215] Having appreciated that distinction, it follows that O 69 r 8(2)(b) of the RC 2012 serves a useful purpose in the registration and enforcement of an arbitral award and is not merely adjectival in nature. It can be read harmoniously with s 38 of the Act as it contemplates a situation whereby the court upon being asked to register an award:
- G** (a) firstly ascertains that there is some positive act or thing which must be performed within the substance of the arbitral award;
 - (b) if that is the case, whether there has been non-compliance with the award or a part of the award as of the date of the application;
 - H** (c) where there is some positive act or thing that requires enforcement, then in accordance with s 38 of the Act and O 69 r 8(2)(b) of the RC 2012 read together the court can proceed to register and enforce the judgment; and
 - I** (d) where there is nothing to be complied with, as is the somewhat unusual case here, as in the form of a negative declaration or a failure to grant the claimant the relief sought, the court may exercise its discretion to refuse summary enforcement because the court concludes that it is unnecessary. In short, it may in the exercise of its jurisdiction conclude that summary enforcement is unwarranted as there is nothing to

enforce. In so doing, the court may consider whether there is any utility or benefit in making the order of recognition and enforcement.

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[216] To my mind such a construction of s 38 of the Act together with O 69 r 8(2)(b) of the RC 2012 makes for a harmonious construction of the Act as well as the Rules of Court 2012. The fact that O 69 r 8(2)(b) was not removed from the Rules of Court 2012, repealed nor varied suggests that it remains relevant for the purposes of construing the relevant statutory provisions in relation to the registration and enforcement of an arbitral award. This militates against simply ignoring the rule altogether.

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[217] The distinction between being jurisdictional in nature rather than purely adjectival is less important than the ability to read the provisions harmoniously.

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[218] Further and in any event, it appears that the grant of the summary registration and enforcement procedures is not an administrative rubber stamping exercise. In *West Tankers Inc v Allianz Spa, The Front Comor* [2012] 2 All ER (Comm) 113; [2012] EWCA Civ 27 the English Court of Appeal when dealing with its admittedly permissive rather than mandatory provisions relating to leave to register and enforce an award held, inter alia, as follows:

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The purpose of s 66(1) and (2) (the provisions of the English Arbitration Act 1996 which contains permissive provisions expressly allowing for the recognition and enforcement of an award by leave of court) is to provide a means by which the victorious party in an arbitration can obtain the material benefit of the award in his favour other than by suing on it. *Where the award is in the nature of a declaration and there is no appreciable risk of the losing party obtaining an inconsistent judgment in a member state which he may try and enforce within the jurisdiction, leave will not in general stand to be granted because the victorious party will not thereby obtain any benefit which he does not already have by virtue of the award per se. In short, in such a case, the grant of leave will not facilitate the realisation of the benefit of the award.* Where, however, as here the victorious party's objective in obtaining an order under s 66(1) and (2) is to establish the primacy of a declaratory award over an inconsistent judgment, the court will have jurisdiction to make a s 66 order because to do so will be to make a positive contribution to the securing of the material benefit of the award. (Emphasis added.)

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[219] In other words, where the arbitral award is in the form of a declaration such that it makes no positive order that is capable of enforcement, the registering court, in the exercise of its jurisdiction, can determine whether there is any utility in registering the award as there is nothing to enforce. This follows from O 69 r 8(2)(b) of the RC 2012. The court is not bound to simply mandatorily register it because s 38 of the Act has been fulfilled.

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[220] It is to be noted that s 66 in the United Kingdom statute does differ in

- A its wording from the Malaysian equivalent. The former is permissive in nature while the provision in our statute in s 38 of the Act uses the word 'shall'. Notwithstanding the seemingly mandatory tenor of the Malaysian statute, the fact of the subsistence of O 69 r 8(2)(b) of the RC 2012, which is to be read harmoniously with s 38 of the Act suggests that the court is entitled to:
- B (a) peruse and consider the application to ascertain if there has been non-compliance with the substance of the award; and
- (b) exercise its discretion to refuse to register the award when there is no material benefit to be gleaned from such registration per se, particularly
- C as the arbitral award is binding on the parties to the dispute notwithstanding non-registration of the same.
- D [221] Put another way, the registering court may make a judicial determination whether it is appropriate to register a judgment in terms of the award. Where, as is the rare case here, there is nothing to be enforced or capable of enforcement, the court is not precluded from determining the validity or requirement for registration. In the *West Tankers* case registration was granted but that was primarily because there was an appreciable risk of the losing party obtaining an inconsistent judgment in a member state, which the losing party might try to enforce within the jurisdiction.
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- F [222] A similar sentiment was expressed in the Australian case of *Tridon Australia Pty Ltd v ACD Tridon Inc (Inc in Ontario)* [2004] NSWCA 146. Admittedly there too the statute, namely s 33 of their Commercial Arbitration Act 1984 is permissive in nature. However the reasoning for the grant of recognition namely for the purposes of enforcement, comes through. In other words, where there is no utility or material benefit for the registration and enforcement of an arbitral award the court may refuse or decline to do so. This,
- G inter alia, is what was said in that case at paras 11–12:
- H ... Enforcement is a plain word, and means something quite different from a restatement of the effect of the award in the form of a judgment. The summary procedure provided by s 33 of the Act is a procedure with a purpose, the purpose of enabling the victorious party in an arbitration to obtain the material benefit of the award in its favour in an easier manner than having to sue on the award. There has been nothing put forward in this case to suggest any occasion for enforcement of the declarations made in the interim award. They are binding on the parties and bind them for the balance of the arbitration and beyond that.
- I I agree with Smart AJ's view that there is no utility in making the order sought, but for the perhaps more fundamental reason that there is just no question of enforcement yet arising. In the absence of any question of enforcement arising, it would not be appropriate to grant leave to enforce the award.

[223] Although this provision deals solely with enforcement rather than registration and enforcement the rationale for the grant of leave to enforce, like the provisions for registration and enforcement here, particularly vide O 69 r 8(2)(b) of the RC 2012, envisage that there is non-compliance in respect of which enforcement is necessary. Where that primary element is missing the question that comes to the fore is why the necessity for enforcement, given that the arbitral award is binding on the parties. In so ascertaining the materiality or benefit to be procured from the registration and enforcement of a judgment under s 38 of the Act, the court does act judicially and not 'robotically' (see *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 282 ALR 717 where it was stated at para 141: 'To act robotically is not to act judicially').

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DECLARATORY AWARD

[224] It is settled law that a declaratory judgment or award is not capable of execution or enforcement. As the Federal Court put it in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 3)*:

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There is an added point in so far as staying the effect of the principal judgment is concerned. All that judgment does, inter alia, is to hold that the appellant is a beneficiary under a constructive trust of which the second respondent is a trustee. In short it declares the existence of a constructive trust. It makes no positive order. The weakness of the remedy of declaration lies in the want of its enforceability. A declaration cannot be enforced by execution. In *Prakash Chand v SS Grewal* (1975) Cri LJ 679, the court held as follows:

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A declaratory decree cannot be executed as it only declares the rights of the decree-holder qua the judgement — debtor, and does not, in terms, direct the judgement-debtor to do or to refrain from doing any particular act or things. Since there is no command issued to the judgement-debtor to obey, the civil process cannot be issued for the compliance of that mandate or command.

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In other words, there can be no committal or other execution process issued to enforce a declaration.

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[225] In the instant case as has been stated above, the arbitral award refused the declarations sought by the appellant to the effect that the respondent was in breach of his obligations under the shareholders' agreement. It amounted to a negative declaration in effect in so far as the respondent was concerned. The respondent sought no positive relief or act vides the arbitral process. Accordingly, no positive act or thing was ordered under the award to be carried out by the appellant vis a vis the respondent. In such a case what is there for the respondent to enforce? The answer must be a compelling 'nothing'. If indeed there is nothing to enforce, then the question of non-compliance does not arise, as there is nothing positive to comply with.

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[226] Order 69 r 8(2)(b) of the RC 2012 clearly envisages that registration is

- A** for the purpose of ensuring enforcement. So does s 38 of the Act, which speaks of the recognition and enforcement of awards. If there is no material benefit or utility to be procured from the registration of a judgment, because there is nothing or no positive act or thing to enforce, then the court may in the exercise of its jurisdiction under these sections decline to register the award.
- B** This is because the registration of an award which cannot be enforced and where there has been no non-compliance, serves no purpose. The award remains binding as between the parties and can be set up as a defence in any ensuing proceedings where it is sought to re-litigate that which has been determined by the arbitral award. Res judicata would apply to preclude such a result.
- C**

- D** [227] It has been argued for the respondent that there has been compliance as far as possible with O 69 r 8(2)(b) of the RC 2012 given the nature of the order. The learned High Court judge agreed with this submission. However we are unable to concur with the learned High Court judge or respondent in respect of this submission. If there has been no non-compliance stipulated or stated, because there was nothing to comply with, it cannot follow that O 69 r 8(2)(b) of the RC 2012 has in fact been complied with. There must be a real and not an illusory or perfunctory statement seeking to comply with the said order.
- E** In the instant case there was no compliance with O 69 r 8(2)(b) of the RC 2012 because there was no order handed down by the arbitral tribunal which required compliance.

- F** [228] It has further been argued for the respondent that non-compliance with the substance of the arbitral award has been made out by the ensuing acts of the appellant in trying to remove the respondent from the board of directors, subsequent to the handing down of the final award. This has been characterised as an attempt to circumvent the award. However it is apparent that the steps taken after the award to hold an EGM, related to matters arising subsequent to, or as a result of the outcome of the arbitration. The shareholders proceeded to ascertain whether in light of the fact that the conditional consents were not binding on the respondent as pronounced by the arbitral tribunal, the original provisions of the shareholders' agreement came into play. The appellant was entitled to take these steps given the fact that the original provisions of the shareholders' agreement remained valid. Therefore in deciding to hold an EGM to ascertain whether the respondent's position as a director stood effectively revoked, there was no non-compliance with the arbitral award.
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- I** [229] The shareholders of the appellant were exercising their rights, available to them as a consequence of the findings of the award. The appellant was not going against the terms of the award or failing to comply with it. It was taking further steps in view of the findings of the arbitral tribunal. Therefore the contention that there was a 'subsequent' non-compliance by the appellant is

without merit. In any event, it is non-compliance at the time of the application to register and enforce the award that is relevant.

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[230] Having reviewed the entirety of the comprehensive submissions filed by both learned counsel for the appellant as well as the respondent, I am of the view that:

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(a) the learned High Court judge erred in construing O 69 r 8(2)(b) of the RC 2012 together with s 38 of the Act and determining that it was entirely procedural and to that extent redundant for the purposes of construing s 38 of the Act. On the contrary, I concluded that the said order may be read harmoniously with s 38 of the Act whereby the registering court for an award has the jurisdiction to examine the substance of the award to ascertain that there is non-compliance with the same, necessitating enforcement or that there is some other material utility or benefit to be procured from the exercise of registering and enforcing an arbitral award;

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(b) the learned High Court judge further erred in failing to appreciate that a positive order is a prerequisite for the purposes of recognition and enforcement;

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(c) the approach to an application for recognition and enforcement requires the court to appreciate the content of the award and ascertain that there has been non-compliance necessitating registration and enforcement. In so doing, the court is not merely a 'rubber stamp' (notwithstanding s 8 of the Act) but is exercising a judicial function; and

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(d) it followed therefore that the learned High Court judge misdirected herself by concluding that registration and enforcement was met solely by complying with s 38 *alone of the Act*. Her Ladyship failed to consider that pursuant to O 69 r 8(2)(b) of the RC 2012 the court was entitled to consider the issue of non-compliance, which did not arise by reason of the declaratory award handed down by the tribunal. Consequently the learned High Court judge erroneously went on to consider whether any of the provisions in s 39 of the Act came into play without ascertaining whether the first stage of compliance under section 38 of the Act read together with O 69 r 8(2)(b) of the RC 2012 had been satisfied.

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[231] The appeal is therefore allowed with costs and the ex parte order set aside.

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A *Appeal dismissed by majority*

Reported by Ashok Kumar

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